Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

CITY OF ELKHART,

Petitioner,

-v-

WILLIAM A. BOOKS and MICHAEL SUETKAMP,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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151 pp

QUESTIONS PRESENTED

Beginning in the 1950s, the Fraternal Order of Eagles donated to cities and towns throughout the United States and Canada granite monuments containing, among other things, the text of the Ten Commandments. One such monument has stood on the lawn of the City of Elkhart, Indiana's Municipal Building since 1958 as part of a display which includes a Revolutionary War Monument and a Freedom Monument. A divided panel of the Court of Appeals for the Seventh Circuit held that Elkhart's inclusion of the Ten Commandments monument in the display violates the Establishment Clause. The following questions are presented:

1. Does the Establishment Clause require a city to remove from city property a 40 year old monument containing the text of the Ten Commandments which is part of a larger civic display?

2. Do respondents, whose "injury" consists of no more than the psychological consequences produced by observation of conduct with which they disagree, have standing under Article III to bring an Establishment Clause challenge?

PARTIES

The names of all parties to the proceedings in the court below appear in the caption of this case.[1]

[1]The petitioner is not a nongovermental corporation. *See* Rule 29.6.

TABLE OF CONTENTS

Page

Questions Presented i

Parties ii

Table of Authorities vii

Introduction 1

Decisions Below 1

Jurisdiction 1

Constitutional Provisions 1

Statement of the Case 2

A. Facts 2
B. Proceedings Below 6

Reasons For Granting the Writ 10

I. THE DECISION OF THE SEVENTH CIRCUIT CONFLICTS SQUARELY WITH DECISIONS OF THE TENTH CIRCUIT AND THE SUPREME COURT OF COLORADO. 10

A. The Tenth Circuit 10

B. The Colorado Supreme Court 11

II. THE DECISION OF THE SEVENTH CIRCUIT CONFLICTS SQUARELY WITH THE DECISIONS OF THIS COURT. 13

A. *Stone v. Graham* Does Not Pr sumptively Invalidate Inclusion of a Ten Commandments Display on All Government Premises. 13

B. The Elkhart Display Is Constitutional Under the *Lemon* Test As Applied In *Lynch* and *Allegheny* 15

III. THE DECISION OF THE SEVENTH CIRCUIT CONFLICTS WITH THIS COURT'S DECISIONS ON STANDING FOR ESTABLISHMENT CLAUSE CASES 19

Conclusion 24

Appendices

A. Opinion, *Books v. Elkhart*, No. 00-1114 (7th Cir. 2000) 1a

B. Order Granting Motion to Recall and Stay the Mandate, *Books v. Elkhart*, No. 00-1114 (7th Cir. 2001) (Ripple, J., in chambers) 55a

C. Memorandum Order, *Books v. Elkhart*, No. 3:98CV0230 AS, (N.D. Ind. 1999) 60a

D. *THE ELKHART TRUTH* NEWSPAPER MAY 31, 1958 (article) 107a

E. AFFIDAVIT OF E. J. RUEGEMER 110a

F. AFFIDAVIT OF HAROLD WINEINGER 112a

G. Resolution 116a

TABLE OF AUTHORITIES

Page

CASES

ACLU v. County of Allegheny, 842 F.2d 655 (3d Cir. 1988) 22

Adland v. Russ, 107 F. Supp. 2d 782 (E.D. Ky. 2000) 14

Anderson v. Salt Lake City, 475 F.2d 29 (10th Cir.), *cert. denied*, 414 U.S. 879 (1973) ..... 4, *passim*

Books v. City of Elkhart, 79 F. Supp. 2d 979 (N.D. Ind. 1999) 1

Books v. City of Elkhart, Indiana, 235 F.3d 292 (7th Cir. 2000) 1

Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995) 7

City of Edmond v. Robinson, 517 U.S. 1201 (1996) 22

County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989) ..... 7, *passim*

Doe v. Harlan County School Dist., 96 F. Supp. 2d 667 (E.D. Ky. 2000) 14

Donnelly v. Lynch, 691 F.2d 1029 (1st Cir. 1982) 22

Edwards v. Aguillard, 482 U.S. 578 (1987) 14, 16

TABLE OF AUTHORITIES - *cont'd*

Page

Harris v. City of Zion, 927 F.2d 1401 (7th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992) 23

ICLU v. O'Bannon, 110 F. Supp. 2d 842 (S.D. Ind. 2000) 14

Lee v. Weisman, 505 U.S. 577 (1992) 14, 21

Lemon v. Kurtzman, 403 U.S. 602 (1971) ..... 7, *passim*

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 20, 21

Lynch v. Donnelly, 465 U.S. 668 (1984) ..... 7, *passim*

Marsh v. Chambers, 463 U.S. 783 (1983) 7, 23

McGowan v. Maryland, 366 U.S. 420 (1961) 16

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) 17

School District of Abington Township v. Schempp, 374 U.S. 203 (1963) 21

Steel Co. v. Citizens for Better Env., 523 U.S. 83 (1998) 21, 23

State of Colorado v. Freedom from Religion Foundation, Inc., 898 P.2d 1013 (Colo. 1995), *cert. denied* 516 U.S. 1111 (1996) ..... 3, *passim*

Stone v. Graham, 449 U.S. 39 (1980) ..... 7, *passim*

Page

Summum v. Callaghan, 130 F.3d 906 (10th Cir. 1997) 10

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) ..... 20, *passim*

Vermont ANR v. U.S. ex rel. Stevens, 529 U.S. 765 (2000) 20

Wallace v. Jaffree, 472 U.S. 38 (1985) 21

Washegesic v. Bloomingdale Public Schools, 33 F.3d 679 (6th Cir. 1994), *cert. denied*, 514 U.S. 1095 (1995) 24

Whitmore v. Arkansas, 495 U.S. 149 (1990) 20

Zorach v. Clauson, 343 U.S. 306 (1954) 19

OTHER AUTHORITIES

Expressive Harms and Standing, 112 Harv. L. Rev. 1313 (1999) 21

Hutson, James H., *Religion and the Founding of the American Republic*, 1998, Library of Congress, Washington, D.C., pp. 50-51. 19

INTRODUCTION

Three courts have reached two different conclusions about the constitutionality of government displays of the same Fraternal Order of Eagles Ten Commandments monument. The Tenth Circuit and the Supreme Court of Colorado have found no constitutional impediment to such displays. The court below, a divided panel of the Seventh Circuit, held that such a display violates the Establishment Clause.

DECISIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is reported as *Books v. City of Elkhart, Indiana*, 235 F.3d 292 (7th Cir. 2000), App. A. The decision of Circuit Judge Ripple granting petitioner's motion for stay of the mandate is reported as __ F.3d __ (2001) (Ripple, J., in chambers), App. B. The decision of the district court is reported as *Books v. City of Elkhart*, 79 F. Supp. 2d 979 (N.D. Ind. 1999), App. C.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment in this case on December 13, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

U.S. Const. amend. I.

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV § 1.

STATEMENT OF THE CASE

Plaintiffs, respondents here, brought the underlying action pursuant to 42 U.S.C. § 1983 alleging that Elkhart's display of the Ten Commandments monument violates the Establishment Clause and seeking declaratory and injunctive relief.

A. Facts

In 1958, the people of Elkhart, Indiana observed Memorial Day with a parade down Main Street, featuring a unit of the Indiana National Guard, marching bands, floats, trucks, and military vehicles. The parade followed the presentation to Elkhart of a stone monument containing, among other things, a version of the Ten Commandments. App. 107a. The Ten Commandments monument was placed on the Municipal Building lawn as part of a larger display which includes a Revolutionary War Monument and a Freedom Monument.

The Ten Commandments monument at issue is a granite slab, six feet high and three and one-half feet wide. App. 63a. At the top of the monument, there are two small tablets of Hebrew script. *Id.* Between the two tablets is an eye within a pyramid — similar to the symbol on the back of a one dollar bill. *Id.* Below the text of the Decalogue are two

Stars of David and one Chi-Rho — an ancient Christian symbol. App. 64a. A scroll is depicted at the bottom center of the monument bearing these words: "Presented To The City of Elkhart, Ind. By Elkhart Aerie No. 395 Fraternal Order of Eagles May 1958." *Id.*

The Ten Commandments stone was a gift to Elkhart from the local lodge of the Fraternal Order of Eagles (hereafter "FOE") as part of a national program of similar donations. App. 62a. The FOE is a non-religious, civic organization founded in 1898 as "The Fraternity for the Common Man." *Id.* Its four cornerstone principles are "Liberty, Truth, Justice and Equality." *Id.* The FOE takes credit for sponsoring America's first workers' compensation law, mothers' pension law, and old age pension law. App. 112a. The group is involved in an impressive array of humanitarian efforts in this country and abroad. *Id.*

The FOE Ten Commandments donations originated with a Minnesota juvenile court judge, E. J. Ruegemer, who once served as Chief Justice and Chairman of the Youth Guidance Committee of the FOE. App. 110a. In 1943, having observed that many of the youngsters who appeared in his court were without any code of conduct or standards, Judge Ruegemer thought "they could benefit from exposure to one of mankind's earliest codes of conduct, the Ten Commandments." *Id.* Judge Ruegemer did not intend such exposure "to be religious instruction of any kind, but to show these youngsters that there were such recognized codes of behavior to guide and help them." *Id.*

With the perhaps self-serving encouragement of Hollywood mogul Cecil B. DeMille,[1] producer and director

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[1] *See State of Colorado v. Freedom from Religion Foundation Inc.*, 898 P.2d 1013, 1017 (Colo. 1995), *cert. denied*, 516 U.S. 1111 (1996).

of the 1956 movie, "The Ten Commandments," Judge Ruegemer's original idea of posting paper copies of the Decalogue in juvenile courts soon metamorphosed into granite monuments inscribed with a version of the Ten Commandments agreed upon by representatives of the Jewish, Protestant, and Catholic communities. *Id.* Over the next several decades, local lodges of the FOE donated Ten Commandments monuments to cities and towns across the United States and Canada as part of its "youth guidance project." App. 3a. [2]

The Memorial Day, 1958, presentation of the Ten Commandments monument to Elkhart included as participants, the city controller, local FOE officers, and representatives of Elkhart's Protestant, Catholic and Jewish religious bodies. App. 3a. Each member of the clergy spoke at the ceremony and noted the importance to American society of adhering to a moral code as exemplified by the Ten Commandments. *Id.* Rabbi M. E. Finkelstein said that the dedication of the monument "should be an occasion for dedication of everyone to the high ideals inherent in the American way of life." *Id.*

Since that day the Ten Commandments monument has stood on the 25 foot wide front lawn area of the Elkhart Municipal Building along with two other monuments: a large stone Revolutionary War Monument donated by the Daughters of the American Revolution and a Freedom Monument consisting of a brick pillar with a light on its top and a plaque reading: "Behold Friend, You Are Now On Hallowed Ground For Here Burns Freedoms Holy Light." App. 4a. The Ten Commandments monument is six feet high; the Revolutionary War Monument is three feet four inches high; the Freedom Monument is eight and one-half feet high. App. 63a. All three monuments are approximately the same distance from the main entrance to the Municipal Building and from the public sidewalk. App. 5a.

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[2] *See Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 30 (10th Cir. 1973), *cert. denied*, 414 U.S. 879 (1973).

The entrance to the Municipal Building itself is graced by a relief of an elk's head flanked by the Latin words "DEDICATVM" and "JVSTITIAM." App. 4a. There are numerous other historical and cultural plaques located in the foyer just inside the Municipal Building entrance, and in the open areas of the first, second and third floors of the building. App. 116a. The City maintains the lawn and walkways surrounding the three monuments on the front lawn, but contributes no time, money, or efforts to maintaining the monuments themselves. *Id.*

The Elkhart FOE monument apparently aroused no controversy for four decades. App. 6a. Then, in 1998, the Indiana Civil Liberties Union contacted Elkhart's Mayor and threatened to sue unless Elkhart removed the Ten Commandments from city-owned property. *Id.* In response, Elkhart's Common Council adopted Resolution No. R-10-98 which set forth the City's reasons for keeping the monument where it stands. App. 66-67a. The council summarized its reasons as follows:

> The Ten Commandments Monument is a historical and cultural monument that reflects one of the earliest codes of human conduct. It is proper for the Ten Commandments Monument to remain and the defense of this position is strongly endorsed. *Id.*
>
> This lawsuit followed.

Respondent William Books is an Elkhart resident who alleges he is offended by the FOE monument and complains that on those occasions when he goes to the Municipal Building, and also during his daily activities, he is forced to come into contact with the monument. App. 7a. Although Books admits he could use the other doors of the Municipal Building to avoid the monument (App. 7a), he avers that "Even if I don't see it, I certainly know it is there. It offends me if I think about it." App. 67a.

Respondent Michael Suetkamp is also an Elkhart resident who alleges he is deeply offended by the monument. App. 7a. In his routine activities he passes the monument frequently and, although he does not always look at it, "even if I don't see it, I certainly know it is there." App. 7-8a.

The plaintiffs did not allege in their complaint, nor have they subsequently alleged, that any taxes or public funds have been or are used to maintain the monument.

B. Proceedings Below

Plaintiffs filed suit in the United States District Court for the Northern District of Indiana on May 5, 1998. In their complaint, plaintiffs alleged that they are forced to come into frequent, direct and unwelcome contact with the Ten Commandments monument. They did not claim to have standing based on their status as taxpayers. They asked the court to declare that Elkhart's display violates the Establishment Clause and to enjoin the city from continuing to display it.

1. *The District Court*

The district court decided the case on the parties' cross-motions for summary judgment. The court granted the City of Elkhart's motion for summary judgment.

The district court stated that the question of standing was "very close" and that "the current Supreme Court has on more than one occassion narrowed the doctrine of standing applicable here." App. 73a. The court noted, however, that recent Seventh Circuit pronouncements would appear to support a finding of standing even though the monument stands at a distance from the entrance to the building and even though someone could enter the building without even noticing the monument. *Id.* The court thus found that "the scales tip ever so slightly in favor of the plaintiffs." *Id.*

The court then held that Elkhart's display of the Ten Commandments passed constitutional muster under any of the five tests the court gleaned from this Court's Establishment Clause jurisprudence: (1) The Historical Precedent Test, *Marsh v. Chambers*, 463 U.S. 783 (1983); (2) The Lemon Test, *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); (3) The Endorsement Test, *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring in the judgment); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 592-94 (1989); (4) The Coercion Test, *Allegheny*, 492 U.S. at 659-63 (Kennedy, J., concurring in part, dissenting in part); and, (5) The Test for Religious Speech in a Public Forum, *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995). App. 75a.

The district court noted that the display of FOE monuments virtually identical to Elkhart's had been upheld by the Tenth Circuit in *Anderson v. Salt Lake City*, 475 F.2d 29 (10th Cir., 1973), *cert. denied*, 414 U.S. 879 (1973), and the Supreme Court of Colorado in *Colorado v. Freedom From Religion Foundation*, 898 P.2d 1013 (Colo. 1995), *cert. denied*, 516 U.S. 1111 (1996). App. 98a.

2. *The Court of Appeals*

A divided panel of the Seventh Circuit reversed. The court found that plaintiffs had standing because they are forced to view a religious object they wish to avoid when attending the government-owned place where the object is located. App. 13a.

The court applied the *Lemon* test as modified by the "endorsement" approach of *Lynch* and *Allegheny*. App. 15a. The majority took, as its "starting point," this Court's decision in *Stone v. Graham*, 449 U.S. 39 (1980). App. 16a. From *Stone*, the majority concluded that it must focus presumptively on the religious component of the Ten Commandments as opposed to its significance as a moral or ethical document. *Id.* The court recognized that a display of a religious symbol

may have a secular purpose, noting that "the text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order." *Id.* Indeed, the panel observed that this Court's own courtroom is decorated with a frieze containing a permanent depiction of Moses holding the Ten Commandments. App. 16-17a. Nevertheless, the panel majority was ultimately persuaded that Elkhart's purpose in displaying the monument was the constitutionally impermissible one of promoting religious ideals. App. 18a. Important to the court's reasoning was the presence of the clergy representatives at the 1958 dedication ceremony and the specific statements they made which the court viewed as urging the people of Elkhart "to embrace the specific religious code of conduct taught in the Ten Commandments." App. 17-18a.

The panel majority rejected the argument that the 1998 Common Council Resolution provided a secular basis for retaining the monument. The majority found it significant that the resolution was issued "on the eve of litigation"; the majority articulated no other reason for rejecting the city's avowed secular purpose. App. 18a.

The majority also found that the display fails the second prong of the *Lemon* test in that it impermissibly creates the perception of government endorsement of religion. App. 19a. Not only do the presence of the Revolutionary War Monument and the Freedom Monument fail to dilute the religious message, in the majority's view, that message is enhanced by the Freedom Monument's reference to "hallowed ground." App. 23a.

Judge Manion's dissent focused on whether a secular purpose supported Elkhart's 1998 decision to retain the 40-year-old monument. He noted that the 1998 Resolution identified several secular purposes, each of which has been accepted as valid by this Court and lower courts addressing this issue. App. 28-29a. Judge Manion noted that the majority itself recognized as a legitimate secular purpose the recognition

of the Ten Commandments' "significant impact on the development of the fundamental legal principles of Western Civilization." App. 28a. He pointed out that the sole basis articulated for the majority's rejection of the asserted secular purpose — the timing of the City's Resolution — was readily explained by the obvious fact that, until the respondents threatened this lawsuit, there had never been any reason for Elkhart to formally state its purpose for retaining the monument. App. 30-31a. Judge Manion also disagreed with the focus on the 1958 statements of the clergymen since "the religious leaders were not the City, and it is only the City's intent that matters." App. 31-32a.

Judge Manion likewise disagreed with the majority's endorsement analysis. He noted that under this Court's *Lynch* and *Allegheny* decisions, "context is everything." App. 36a. Judge Manion stated that when Elkhart's display is viewed in its proper context, by an objective observer, it is constitutionally permissible. In fact, an even stronger case can be made for the FOE monument's constitutionality, he contended, than for the exclusively religious object — a creche — at issue in *Lynch*. *Id.*

Finally, Judge Manion stressed the inapplicability of *Stone v. Graham*, a 5-4 *per curiam* opinion rendered without the benefit of briefing or argument, decided before *Lynch* or *Allegheny*, and properly confined to the special context of the public schoolroom:

> [W]hile *Stone* speaks for the school setting — where student attendance is compulsory, and pupils are particularly susceptible to influence — it does not answer the question in the context of an open courtyard where citizens may divert their eyes, if confronted by a discomforting reference to God, to one of the other monuments forming the larger historical display.

App. 45a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SEVENTH CIRCUIT CONFLICTS SQUARELY WITH DECISIONS OF THE TENTH CIRCUIT AND THE SUPREME COURT OF COLORADO.

The Seventh Circuit's decision requiring Elkhart to remove the FOE Ten Commandments monument on its property conflicts squarely with the decisions of two courts which have previously rejected challenges to government displays of identical FOE monuments.

A. The Tenth Circuit

Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973), *cert. denied* 414 U.S. 879 (1973), was an Establishment Clause challenge to Salt Lake City's decision to permit the Fraternal Order of Eagles to erect on city-county courthouse grounds a Ten Commandments monument like the one at issue in the present case. The monument was situated "in a prominent place near the courthouse entrance," *Id.* at 30. The court noted that similar monuments have been erected in public places across the United States and Canada — nine in Utah alone — as part of the Eagles' youth guidance program. *Id.*

Noting that "the Decalogue is at once religious and secular," *id.* at 33, the Tenth Circuit observed that "[t]he wholesome neutrality guaranteed by the Establishment and Free Exercise Clauses does not dictate obliteration of all our religious traditions," *id.* at 34. The court held that the monument was "primarily secular" and that "neither its purpose or effect tends to establish religious belief." *Id.*[3]

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[3] In *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997) — a suit to compel a city to display another monument when the city already displayed a Ten Commandments monuments —a panel

B. The Colorado Supreme Court

In *State of Colorado v. Freedom from Religion Foundation, Inc.*, 898 P.2d 1013 (Colo. 1995), *cert. denied*, 516 U.S. 1111 (1996), the Colorado Supreme Court rejected an Establishment Clause challenge to that State's display of an FOE Ten Commandments monument on the grounds of the State Capitol. Reviewing the evidence before the trial court regarding the origin, nature, and use of the Decalogue, the Colorado Supreme Court stated:

> All the experts who testified at trial agreed that, at least to the extent that the Commandments established ethical or moral principles, they were expressions of universal standards of behavior common to all western societies. It was agreed that these moral standards, as influenced by the Judeo-Christian tradition, have played a large role in the development of the common law and have formed a part of the moral background for the adoption of the national constitution.

Id. at 1024.

The court also found significant the facts that the FOE monument does not reproduce exactly the Ten Commandments as accepted by any particular sect, that the monument contains symbols of more than one religious tradition, and that the monument contains patriotic symbols such as the eagle and the American flag. *Id.* When these facts were coupled with the secular intent of the FOE itself in making the donation,

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of the Tenth Circuit stated that the *Anderson* decision had been "called into question" by this Court's decision in *Stone v. Graham*. *Id.* at 913, n.8. This is clearly not accurate since *Stone* neither cited nor referred to *Anderson* and is obviously distinguishable from it due to the markedly different factual settings. Notwithstanding the panel's misperception of *Stone*, the court expressly declined an invitation to overrule *Anderson*, which remains the law in the Tenth Circuit. *Id.*

the court concluded that the purpose of the display is primarily secular. *Id.*

With respect to the endorsement test, the court noted that the FOE monument was one of a number of objects on display in the Capitol Complex Grounds. The court described various monuments honoring veterans of different wars, a replica of the Liberty Bell, and a flagpole dedicated to citizens killed in the Spanish-American war. *Id.* at 1025. The court concluded:

> [W]e find that the preeminent purpose of erecting the monument was not plainly religious in nature — rather, the monument respects the secular objective intended at the outset, recognition of a historical, jurisprudential cornerstone of American legal significance. Moreover, the content and context of the display do not convey a message that any person is excluded from our political community based on religious beliefs or the lack of such beliefs.

Id. at 1026.

Despite the fact that both *Anderson* and *Freedom from Religion* involved the same monument donated by the same fraternal organization, under circumstances nearly identical to the case at bar, the Seventh Circuit panel majority failed to cite either case, let alone attempt to distinguish them.[4] Thus, absent resolution of this conflict, an FOE Ten Commandments

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[4]Both parties in the District Court cited and argued the applicability of these cases. The District Court discussed them at some length. App. 86a, 95a-97a. Nevertheless, it was only after Elkhart filed a Motion to Stay the Issuance of Mandate in this matter, relying in large part on the obvious conflict between the decision below and *Anderson* and *Freedom from Religion*, that a member of the panel acknowledged these cases and attempted to distinguish them from the case at bar. App. 57-58a.

monument passes constitutional muster in Salt Lake City and Denver but violates the Establishment Clause in Elkhart.

This Court should grant review to resolve this conflict.

II. THE DECISION OF THE SEVENTH CIRCUIT CONFLICTS SQUARELY WITH THE DECISIONS OF THIS COURT.

The Seventh Circuit panel's decision in this case ignores this Court's clear precedents regarding government displays of objects having religious significance. To the extent the panel's error proceeded from a misreading of this Court's decision in *Stone v. Graham*, this Court should intervene and clarify *Stone*'s proper scope and applicability.

A. *Stone v. Graham* Does Not Presumptively Invalidate Inclusion of a Ten Commandments Display on All Government Premises.

The panel majority took as its "starting point" this Court's decision in *Stone v. Graham* striking down a Kentucky law requiring the posting of the Ten Commandments in public school classrooms. App. 16a. This Court's observation that the Ten Commandments "are undeniably a sacred text," 449 U.S. at 41, was misapplied by the majority to create what amounts to a *de facto* presumption that displays of the Decalogue violate the Establishment Clause. This presumption led the court to view with a suspicion bordering on hostility the Elkhart Common Council's 1998 Resolution setting forth several perfectly valid secular purposes for not removing the 40-year-old FOE monument. *Stone* neither compels nor supports such a presumption of unconstitutionality whenever government chooses to display the Ten Commandments.

Stone is distinguishable from the case at bar for a number of reasons. First, *Stone* arose in the setting of the public school classroom, a setting which has invariably called forth this Court's heightened sensitivity to Establishment

Clause concerns. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 592 (1992) ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in schools"); *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987) ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools"). The *Stone* majority recognized, however, that the Ten Commandments could properly be incorporated even into the public school curriculum as part of "the study of history, civilization, ethics, comparative religion, or the like." *Stone*, 449 U.S. at 42. It was only the required posting of the Decalogue in isolation in public school classrooms which was forbidden by *Stone*.

The second major distinction is that *Stone* was decided before this Court's decisions in *Lynch* and *Allegheny*, the two cases which, more than any others, provide the analytical framework for judging the constitutionality of government displays of objects with religious significance.

Stone v. Graham is of limited utility in analyzing displays of the Ten Commandments on government property, outside of the limited context of public schools. To the extent that the Seventh Circuit majority and other courts[5] have read *Stone* presumptively to invalidate such displays, this Court should clarify the proper scope of its holding in *Stone*.

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[5]*See, e.g., Doe v. Harlan County School Dist.*, 96 F. Supp. 2d 667, 674 (E.D. Ky. 2000) (citing *Stone v. Graham* for proposition that very nature of Ten Commandments precludes a finding of a prevailing secular purpose); *Adland v. Russ*, 107 F. Supp. 2d 782, 784-85 (E.D. Ky. 2000) (quoting *Doe v. Harlan County* for proposition that nature of Decalogue precludes finding of secular purpose); *ICLU v. O'Bannon*, 110 F. Supp. 2d 842, 851 (S.D. Ind. 2000) (taking *Stone v. Graham* as "starting point" for finding of Establishment Clause violation in display of Ten Commandments monument at State Capitol).

B. The Elkhart Display Is Constitutional Under The *Lemon* Test As Applied In *Lynch* and *Allegheny*.

Both the panel majority and the dissent in the Seventh Circuit analyzed Elkhart's display under the three-pronged test of *Lemon v. Kurtzman*, as refined by the endorsement test of *Lynch* and *Allegheny*. *See supra*. *Lemon* asks whether the challenged government action 1) has a secular purpose; 2) has the primary effect of advancing or inhibiting religion; and 3) fosters an excessive entanglement between government and religion.[6] *Lemon*, 403 U.S. at 612-13. *Allegheny* refined *Lemon* by clarifying that the Court's approach in these cases involves a determination of "whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion.'" *Allegheny County*, 492 U.S. at 592. The panel majority in this case held that Elkhart's display violated both the purpose and effect prong of *Lemon*.

The majority's error stems from its misapplication of this Court's precedents. Regarding Elkhart's purpose, the majority focused exclusively on the statements made by the clergymen at the 1958 dedication of the FOE monument, statements which admittedly contained religious references. As noted by the dissent, however, the clergymen were not speaking as representatives of the City of Elkhart, but as representatives of their respective religious bodies. App. 32a. In the absence of a 1958 statement by City representatives of their purpose in accepting the gift offered by the Fraternal Order of Eagles, there is no basis for attributing to the City the sentiments of the guests who attended the dedication ceremony. A far more logical approach would be that followed by the Colorado Supreme Court which, in similar circumstances, "ascribe[d] to the donee the intent of the donor — that is, acceptance of the gift by the State, without other

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[6]The parties in this case agree that the excessive entanglement prong of *Lemon* is not at issue here.

evidence, indicates the State's assent to the Eagles' stated secular purpose," i.e., the promotion of morality. *Freedom From Religion*, 898 P.2d at 1024.

Elkhart has, in effect, made two statements about its purpose in accepting and displaying the FOE monument. The first is the non-verbal statement the City made in 1958 by placing the monument in a preexisting display of monuments with historical, secular significance. Even the physical placement of the FOE monument, which put it equidistant with the Revolutionary War Memorial and the Freedom Monument from the Municipal Building entrance and did not in any way highlight or emphasize the Ten Commandments, speaks eloquently of the City's purpose to display the Decalogue for its universally recognized secular significance.[7]

The more explicit statement, of course, is the 1998 Common Council Resolution which the panel majority dismissed. The majority acknowledged this Court's rule that courts should normally defer to a governmental articulation of a secular purpose, App. 18-19a (citing *Edwards v. Aguillard*,

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[7]As then-Justice Rehnquist put it in *Stone v. Graham*: "It is equally undeniable . . . that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World." *Stone*, 449 U.S. at 45 (Rehnquist, J., dissenting). One example of this "significant impact" was addressed by this Court in *McGowan v. Maryland*, 366 U.S. 420 (1961), a case involving a challenge to Maryland's Sunday Closing laws. In his separate opinion, Mr. Justice Frankfurter traced the history of Sabbath legislation and demonstrated that so-called "blue laws," although undeniably linked to the Ten Commandments, have always had a secondary civil purpose. This linkage presented no constitutional impediment, as Justice Frankfurter observed: "Innumerable civil regulations enforce conduct which harmonizes with religious concerns. State prohibition of murder, theft and adultery reinforce commands of the decalogue." *Id.* at 462. In summary, "[N]o constitutional command which leaves religion free can avoid this quality of interplay." *Id.*

482 U.S. 578, 586 (1983)); nevertheless, the majority proceeded to reject Elkhart's avowed secular purpose without citing a single fact other than the timing of the resolution. App. 19a.[8]

Whether the majority's conclusion rests on its misreading of *Stone* or upon some unexpressed suspicion of the City's actual motives, that conclusion clearly does not rest on evidence in the record. *Cf. Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (citing specific record testimony and documents demonstrating government's purpose was to circumvent requirements of Establishment Clause); *Aguillard*, 482 U.S. at 591-93 (citing specific statements by legislators evidencing a clear religious purpose for enacting statute).

By applying what amounts to a *per se* presumption of unconstitutionality, which apparently cannot be overcome by undisputed evidence of a secular purpose, the Seventh Circuit has departed from this Court's precedents in such a way as to leave governments defenseless against Establishment Clause challenges of this nature.

The Seventh Circuit panel majority also misapplied the endorsement test as articulated in both *Lynch* and *Allegheny*. In *Lynch*, this Court upheld the display of a purely religious symbol — a creche — because of the overall secular context in which it was displayed. *Lynch*, 465 U.S. at 686. In *Allegheny*, this Court found that an isolated display of a creche in the most prominent setting in the seat of government violated the Establishment Clause. *Allegheny*, 492 U.S. at 598-99. But the Court upheld the display of another religious symbol — a menorah — because it stood next to a Christmas tree

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[8]As the dissent noted, the timing of the Resolution was dictated by nothing more than the fact that, until plaintiffs threatened to sue, there had never been any reason for the City of Elkhart to formally express its purpose for accepting or displaying the FOE monument. App. 30a-31a.

and a sign saluting liberty which supplied a broader context for the display. *Id.* at 614, (opinion of Blackmun, J.).

In the case at bar, however, the majority turned the endorsement test inside out. Elkhart's inclusion of the Ten Commandments monument among other monuments, according to the majority, only serves to heighten the endorsement of religion. The majority construes the Freedom Monument's use of the phrases "hallowed ground"[9] and "freedom's holy light"[10] as somehow conferring on the nearby Ten Commandments monument an exclusively religious signification. App. 23a. But these phrases are nothing more than examples of the kind of patriotic — not religious — sentiments of which our history is full and examples of which this Court has always viewed as constitutional. *See, e.g.*, *Lynch*, 465 U.S. at 674-75 ("our history is replete with official references to the value and invocation of Divine guidance," and includes "government practices embracing religion, including Thanksgiving and Christmas holidays, congressional and military chaplains and the congressional prayer room, the motto, the Pledge of Allegiance, and presidential proclamations for a National Day of Prayer"). Rather than converting the message of the FOE monument into an exclusively religious one, the presence of these traditional patriotic expressions actually has the opposite effect on a

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[9]The phrase is taken from Lincoln's Gettysburg Address. The prominent display of this phrase in military parks in Pennsylvania and elsewhere hardly converts such government properties into religious shrines.

[10]This phrase is taken from the patriotic standard "America," the final verse of which concludes:

> "Long may our land be bright
>
> With freedom's holy light.
>
> Protect us by Thy Might,
>
> Great God, our King."

reasonable observer, i.e., it underscores the fact that Elkhart displays the Ten Commandments as a text which has become part of Western secular culture.[11]

The panel majority opinion in this case is inconsistent with a correct reading of this Court's Establishment Clause jurisprudence. It implicitly adopts the very attitude of hostility toward religion against which this Court has always warned. *See Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

III. THE DECISION OF THE SEVENTH CIRCUIT CONFLICTS WITH THIS COURT'S DECISIONS ON STANDING FOR ESTABLISHMENT CLAUSE CASES.

The respondents claim to have standing based solely on the fact that they are offended by Elkhart's display of the FOE monument and that they are forced to view the monument when passing or entering the Municipal Building. They specifically do not allege taxpayer standing. Such a low threshold for invoking the jurisdiction of the federal courts amounts to virtually no threshold. It flies in the face of this

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[11]The story of Moses leading the people of Israel from slavery to freedom was so much a part of the intellectual milieu of the founding generation that, in response to a congressional commission of July 4, 1776 to devise a seal for the United States, Benjamin Franklin and Thomas Jefferson proposed the following:

> "Pharaoh sitting in an open chariot, a crown on his head and a sword in his hand passing through the waters of the Red Sea in pursuit of the Israelites: rays from a pillar of fire in the cloud, expressive of the divine presence and command, reaching to Moses who stands on the shore and, extending his hand over the sea, causes it to overwhelm Pharaoh.
>
> Motto: Rebellion to Tyrants is Obedience to God."

Hutson, James H., *Religion and the Founding of the American Republic*, 1998, Library of Congress, Washington, D.C., pp. 50-51.

Court's decisions on standing in Establishment Clause cases and converts the federal courts into mere debating societies.

In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982), this Court held that plaintiffs who allege no injury beyond the "psychological consequence presumably produced by observation of conduct with which one disagrees" do not have standing under Article III.

The plaintiffs in *Valley Forge* were a nonprofit organization committed to the principle of separation of church and state and several of the organization's employees. The plaintiffs objected to the federal government's conveyance of surplus real property from the Department of Health, Education, and Welfare to a nonprofit school operated by the Assemblies of God. In reaching the conclusion that plaintiffs lacked standing, this Court said:

> Their claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court. The federal courts were simply not constituted as ombudsmen of the general welfare.

Id. at 487.

The Court labeled the following requirements for standing "an irreducible minimum": actual or threatened injury, traceable to the defendant's putatively illegal conduct, and likely to be redressed by a favorable decision. *Id.* at 472. The Court has not wavered from this "irreducible minimum" in the two decades since *Valley Forge*. *See Vermont ANR v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000). In fact, this Court has repeatedly emphasized the fundamental importance of these requirements to the entire framework of our constitutional form of government. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Lujan v. Defenders of Wildlife*, 504 U.S. 555,

559-60 (1992) ("the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts"); *Steel Co. v. Citizens for Better Env.*, 523 U.S. 83, 101 (1998) ("constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers").

This Court has never specifically addressed the issue of standing in a religious display case. *See* Note, *Expressive Harms and Standing*, 112 Harv. L. Rev. 1313, 1320 (1999). The panel majority in the instant case cited several of this Court's religious exercises in public schools cases[12] in support of its finding that respondents' allegation of "direct and unwelcome exposure to a religious message" were sufficient to confer standing. App. 11a (citing *Lee v. Weisman*, 505 U.S. 577 (1992) (student and parent objecting to benediction at public school graduation); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (students and parents objecting to school mandated moment of silence); *Stone v. Graham*, *supra*; *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (students and parents objecting to reading of Bible in school). These cases, however, each involved the unique context of the public school, a context calling forth "heightened concerns with protecting freedom of conscience from subtle coercive pressure," *Lee*, 505 U.S. at 592. The "injury" element is satisfied in these cases because, in the school context, the pressure to participate in objectionable religious exercises, "though subtle and indirect, can be as real as any overt compulsion." *Id.* at 593. This Court has never applied such an analysis to persons who, like the respondents in this case, merely walk or drive by a passive stone which they are free to look at or ignore, revere or revile.

Neither *Lynch* nor *Allegheny* directly addressed the

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[12]The panel majority did not cite or attempt to distinguish *Valley Forge*.

standing issue. The court of appeals in *Lynch*, however, specifically held that the plaintiffs' standing was based on their status as taxpayers. *Donnelly v. Lynch*, 691 F.2d 1029, 1030-32 (1st Cir. 1982). While this Court's *Allegheny* decision did not address the issue, the Third Circuit's opinion contains several references to public money being expended to create and maintain that display, thus strongly suggesting taxpayer standing. *ACLU v. County of Allegheny*, 842 F.2d 655-58 (3d Cir. 1988). There is no suggestion in the record here that any public funds were or are used to maintain Elkhart's monument. Hence, this Court's decisions in *Lynch* and *Allegheny* — which, after all, did not even address standing —cannot be said to have definitively resolved the issue in favor of respondents herein, much less to have overruled *Valley Forge*.

Three members of this Court have questioned whether mere exposure to a religious display or symbol that offends one's beliefs is sufficient to confer standing. *City of Edmond v. Robinson*, 517 U.S. 1201 (1996) (Rehnquist, C.J., with whom Scalia, J., and Thomas, J., join, dissenting from denial of certiorari). In *Edmond*, plaintiffs successfully challenged a city's display of its official seal which contained, among other symbols, a Latin cross. The display of the seal was apparently ubiquitous, appearing on "City limits signs, on City flags, on the uniforms of City police officers and firefighters, on official City vehicles, on stickers identifying City property . . . in the City Council chambers . . . on each utility bill sent out by the City, as well as on official City stationery and the Utility and Sanitation Department's newsletters." *City of Edmond v. Robinson*, 68 F.3d 1226, 1228 (10th Cir. 1995). The Chief Justice observed: "Mere presence in the city, without further allegations of injury, quite clearly fails to meet the standing requirements laid down in cases such as *Valley Forge*." *Edmond*, 517 U.S. at 1202.

Respondents in this case are adults. They do not allege that their taxes are used to maintain the FOE monument. They do not even claim that they have altered their usual

routes of travel or their daily activities to avoid the monument. App. 7a-8a. They claim only that they observe and are offended by the monument when they happen to be passing the Municipal Building or on those evidently infrequent occasions when they actually enter the building. *Id.* Both respondents make a point of noting that the FOE monument disturbs them even when they are not observing it because they "certainly know it is there." *Id.* But respondents' quest for psychic satisfaction is insufficient: "[P]sychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Steel Co.*, 523 U.S. at 107.

Allowing litigants to enjoy standing in cases of this nature runs contrary to this Court's holding in *Valley Forge*. It encourages the very sort of licensing of roaming bands of self-appointed Establishment Clause police which this Court rejected in *Valley Forge*, 454 U.S. at 487. Citizens who have suffered no injury beyond the "psychological consequence presumably produced by observation of conduct with which [they] disagree" are given a veto power over the considered judgments of executives and legislative bodies. Legislators, such as the members of Elkhart's Common Council, find their good faith efforts to strike the often difficult balance between an exaggerated aversion to religion and "a tolerable acknowledgment of beliefs widely held among the people of this country," *Marsh*, 463 U.S. at 792, held up to exacting judicial scrutiny. Such an approach is not conducive to maintaining the "separation and equilibration of powers" which Article III standing doctrine is intended to protect. *Steel Co.*, 523 U.S. at 101. It creates a kind of free admission pass for litigious individuals whose "injuries" are trifling at best.[13]

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[13]The trifling and contrived appearance of such claims has produced frustration among some members of the judiciary. *See, e.g., Harris v. City of Zion*, 927 F.2d 1401, 1419-25 (7th Cir. 1991) *cert. denied*, 505 U.S. 1218 (1992) (Easterbrook, J., dissenting); *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679, 684-85 (6th Cir. 1994) *cert. denied*, 514 U.S. 1095 (1995)

CONCLUSION

Allowing the panel majority's opinion to stand would be to authorize judicially forced removal not only of Elkhart's FOE monument, but hundreds, perhaps thousands, of other virtually identical monuments across the nation. Nothing in this Court's jurisprudence or our nation's history requires or even permits such a radical course.

This Court should grant the petition and reverse the judgment of the Seventh Circuit Court of Appeals.

(Guy, Senior Circuit Judge, concurring). Judge Guy's assessment of plaintiff's claim of "injury" caused by viewing a picture of Christ which has hung on a school wall for 30 years is deserving of note:

> For me, at least, a discussion of "psychological damage" resulting from viewing this picture does implicate an "establishment" — but not one of religion. What is established is a class of "eggshell" plaintiffs of a delicacy never before known to the law. I can well understand that someone (perhaps this plaintiff) in some sense could be offended by this portrait, but "injured" is another matter.

Id. at 684.

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DATED: March 9, 2001

APPENDIX

APPENDIX A
No. 00-1114

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM A. BOOKS and MICHAEL SUETKAMP,

Plaintiffs-Appellants,

v.

CITY OF ELKHART, INDIANA,

Defendant-Appellee.

Argued May 12, 2000
Decided December 13, 2000

Before RIPPLE, MANION and WILLIAMS, Circuit Judges.

RIPPLE, *Circuit Judge.*

On the lawn of the City of Elkhart's Municipal Building stands a monument inscribed with the Ten Commandments. William A. Books and Michael Suetkamp, residents of Elkhart, object to the display of this monument on government property. They brought this action in the district court, claiming that the display of the monument by the City of Elkhart violates the Establishment Clause of the First Amendment to the Constitution of the United States. The district court granted summary judgment for the City of Elkhart. For the reasons set forth in the following opinion, we reverse the judgment of the district court and remand for proceedings consistent with this opinion.

I

BACKGROUND

A. Facts

A monument inscribed with the Ten Commandments is

located on the lawn in front of the Municipal Building of the City of Elkhart ("the City" or "Elkhart"). The plaintiffs, residents of Elkhart, object to the presence of this monument in this location. We therefore must determine whether this presence of the monument violates the Establishment Clause of the Constitution of the United States, which has been made applicable to the states through the Fourteenth Amendment.[1] This task requires that we examine the history of the monument's placement and maintenance as well as the physical characteristics of the monument and of the surrounding area.

1.

In the 1940s, a juvenile court judge in Minnesota, E. J. Ruegemer, inaugurated the Youth Guidance Program. Disheartened by the growing number of youths in trouble, he sought to provide them with a common code of conduct. He believed that the Ten Commandments might provide the necessary guidance. Judge Ruegemer originally planned to post paper copies of the Ten Commandments in juvenile courts, first in Minnesota and then across the country. To help fund his idea, he contacted the Fraternal Order of Eagles ("FOE"), a service organization dedicated to promoting liberty, truth, and justice. At first, FOE rejected Judge Ruegemer's idea because it feared that the program might seem coercive or sectarian. In response to these concerns, representatives of Judaism, Protestantism, and Catholicism developed what the individuals involved believed to be a nonsectarian version of the Ten Commandments because it could not be identified with any one religious group. After reviewing this version, FOE agreed to support Judge Ruegemer's program.

Around this same time, motion picture producer Cecil B. DeMille contacted Judge Ruegemer about the program.

[1] *See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 588, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989); *Wallace v. Jaffree*, 472 U.S. 38, 48-55, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985); *School Dist. of Abingdon Township v. Schempp*, 374 U.S. 203, 215, 10 L. Ed. 2d 844, 83 S. Ct. 1560 (1963) (calling the principle "decisively settled"); *Cantwell v. Connecticut*, 310 U.S. 296, 303, 84 L. Ed. 1213, 60 S. Ct. 900 (1940).

DeMille, who was working to produce the movie "The Ten Commandments," suggested that, rather than posting mere paper copies of the Ten Commandments, the program distribute bronze plaques. Judge Ruegemer replied that granite might be a more suitable material because the original Ten Commandments were written on granite. DeMille agreed with Judge Ruegemer's suggestion, and the judge thereafter worked with two Minnesota granite companies to produce granite monuments inscribed with the Ten Commandments. Local chapters of FOE financed these granite monuments and then, throughout the 1950s, donated them to their local communities. The Elkhart chapter of FOE donated its version of the Ten Commandments monument to the City of Elkhart in 1958.

Elkhart's newspaper, *The Elkhart Truth*, published an article about the dedication of the Ten Commandments monument to the City of Elkhart. See R.29, Ex.A, *Ceremonies Pay Tribute in Memorial Day Rite; City Given Decalogue, The Elkhart Truth*, May 31, 1958, at 1. The dedication was a part of the City's Memorial Day ceremonies, and the participants in the dedication included: Robert Long, city controller; Mahlon Hull, past president of the Elkhart Chapter of FOE; Dale Swihart, lodge secretary for FOE; the Reverend William Gieranowski, assistant pastor of St. Vincent's Catholic Church; the Reverend W. W. Kenhell, outgoing president of the Elkhart Ministerial Association; and Rabbi M. E. Finkelstein of Temple Israel.

According to the newspaper, Reverend Kenhell spoke at the ceremony, imparting the message that "Americans have inherited moral power from the founding fathers of our country, . . . and if they will accept the precepts of the Ten Commandments, it will provide their redemption from today's strife and fear." *Id.* Father Gieranowski also spoke at the ceremony and stated that moral law does not change and that the Ten Commandments should be engraved not only in stone but in the hearts, minds, and consciences of everyone. *See id.* Finally, the newspaper noted, Rabbi Finkelstein explained that the dedication of the monument "should be an occasion for dedication of everyone to the high ideals inherent in the American way of life." *Id.*

2.

As we have noted earlier, Elkhart's Ten Commandments monument is located on the lawn in front of the City's Municipal Building. The Municipal Building, situated on the corners of Second and High Streets in downtown Elkhart, contains the mayor's office, the City's legal and human relations departments, the city court, the prosecutor's office, and the offices of the Common Council. Above the main entrance to the Municipal Building is a bas relief of an elk's head. Directly to the left of the elk's head is the word "DEDICATVM," and on the immediate right of the elk's head is the word "JVSTITIAM."[2] R.29 & 31, Ex.14-16.

The lot for the Municipal Building contains the building itself, sidewalks, and a parking area. Between the building and the sidewalks is a grass lawn that is approximately 25 feet wide. Within this lawn are three monuments. The City maintains this lawn surrounding the monuments but does not contribute any time, money, or effort to the maintenance of the monuments themselves.

On the southeast corner of the building's lot — the corner nearest the intersection — are the Revolutionary War Monument and the Freedom Monument. The Revolutionary War Monument, closest to the street, is a large stone, which bears a plaque and is surrounded by a bed of flowers. *See* R.29 & 31, Ex.23-24. The plaque explains that the monument was donated by the Daughters of the American Revolution in honor of the Revolutionary War soldiers buried in Elkhart County. Behind the Revolutionary War Monument is the Freedom Monument. The Freedom Monument is a brick pillar with a light on its top. A plaque on the pillar reads: "BEHOLD FRIEND, YOU ARE NOW ON HALLOWED GROUND FOR HERE BURNS FREEDOMS HOLY LIGHT." R.29 & 31, Ex.25. Collectively, the Revolutionary War Monument and the Freedom Monument are referred to as the War Memorial.

On the northeast corner of the lot is the Ten Commandments

[2] The bas relief also contains, in smaller lettering, the words "INCORPORATED 1875" on the far left of the elk's head and the words "ERECTED 1915" on the far right of the elk's head. R.29 & 31, Ex.16.

monument.[3] The Ten Commandments monument is made of granite and stands six feet high and three and one-half feet wide. The largest portion of the monument is consumed by the text of the Ten Commandments. The face of the monument reads as follows:

> the Ten Commandments
> I AM the LORD thy God.
> Thou shalt have no other gods before me.
> Thou shalt not make to thyself any graven images.
> Thou shalt not take the Name of the Lord thy God in vain.
> Remember the Sabbath day, to keep it holy.
> Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.
> Thou shalt not kill.
> Thou shalt not commit adultery.
> Thou shalt not steal.
> Thou shalt not bear false witness against thy neighbor.
> Thou shalt not covet thy neighbor's house.
> Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's.

R.29 & 31, Ex.5. This text, as stated previously, is an amalgamation of Jewish, Protestant, and Catholic versions of the Ten Commandments.

At the top of the monument, there are two small tablets that contain ancient Hebrew script. Surrounding both of these tablets is a floral design, and between the two tablets is an eye within a pyramid — an all-seeing eye.[4] Immediately below the all-seeing eye is an American Eagle grasping the American

[3] Both the Ten Commandments monument and the War Memorial are approximately the same distance from the main entrance and from the sidewalks. The Ten Commandments monument is 46 feet from the main entrance and 10 feet from the sidewalk, and the War Memorial is 48 feet from the main entrance and 10 feet from the sidewalk. Both are partially shaded by trees.

[4] The all-seeing eye on the monument is similar to the one depicted on the one-dollar bill.

flag. Below the text on the monument are two small Stars of David. In the center of the two stars is a similarly sized symbol representing Christ: two Greek letters, Chi and Rho, superimposed upon each other. At the base of the monument is a small scroll, which reads as follows:

PRESENTED TO THE CITY OF ELKHART, IND.
BY
ELKHART AERIE NO. 395
FRATERNAL ORDER OF EAGLES
MAY, 1958

Id.

Photos of the Ten Commandments monument and of the front of the Municipal Building were included in the trial record and are attached as appendices to this opinion.

3.

Insofar as this record shows, the presence of the Ten Commandments monument on the lawn of the Elkhart Municipal Building produced no controversy until 1998. In that year, the City's mayor was informed that, unless the monument was removed, a lawsuit would be filed. After this warning was received, the Common Council of the City of Elkhart convened on May 4, 1998, and adopted a resolution "regarding the display of the Ten Commandments on public property." R.29, Ex.B. According to this resolution, the monument and the symbols on its face recognize the historical and cultural significance of the Ten Commandments. The Common Council noted in its resolution that numerous other historical and cultural plaques are inside the Municipal Building. The Common Council further emphasized that "the Ten Commandments have had a significant impact on the development of the fundamental legal principles of Western Civilization." *Id.* Finally, the Common Council concluded that, because the Ten Commandments monument "is a historical and cultural monument that reflects one of the earliest codes of human conduct," it was proper for the monument to remain. Id. Because the Common Council did not remove the monument, two residents of Elkhart filed this action against the City of Elkhart.

4.

Plaintiff William Books is a resident of Elkhart County and has resided in Elkhart since the early 1980s. In Mr. Books' affidavit, he states that "to the extent that I must, or wish to, go to the Municipal Building to participate as a citizen of Elkhart I must come into direct and unwelcome contact with the [Ten Commandments] monument." R.24, Attachment 1, at 2. Mr. Books explains that, in the past, he has gone to the Municipal Building to pay a traffic ticket and to attend City Council meetings when the issues discussed were ones that interested him. Also, notes Mr. Books, his deposition for this case was conducted in the City Attorney's office in the Municipal Building. As Mr. Books explains, although he could use the Municipal Building's side entrance instead of its main entrance in order to avoid the monument, he "knows the Ten Commandments monument is there whether [he] sees it or not." *Id.* at 3.

Mr. Books further explains that he passes the monument in his daily activities, including: riding his bicycle on a route that passes the Municipal Building; patronizing the Elkhart Public Library, which is located across the street from the Municipal Building; and visiting his landlord's office and his cousin's house, both of which are located near the Municipal Building. He states that, in order to avoid seeing the Ten Commandments monument, he "would have to assume the special burden of altering [his] daily routine so as to avoid this direct and unwelcome contact." *Id.* at 2.

Plaintiff Michael Suetkamp is also a resident of Elkhart County and has lived in Elkhart since the early 1990s. In his affidavit, Mr. Suetkamp states that he is an atheist and is offended deeply by the placement of the Ten Commandments monument on the property of the City of Elkhart. He states that he must come in direct and unwelcome contact with the monument to participate as a citizen of Elkhart. As he explains, he has entered the Municipal Building to pay a traffic ticket, to attend a City Council meeting, to talk to the City Council's Clerk, and to have his deposition taken by the City Attorney in this case.

Mr. Suetkamp also avers that he comes in direct and

unwelcome contact with the monument in his daily activities. For example, he states that the route he takes to return home from work passes the Municipal Building and that he sometimes sees the monument when entering the Elkhart Public Library. Although he passes the monument frequently, Mr. Suetkamp admits that he does not look directly at it every time, but he states that "even if I don't see it, I certainly know it is there." R.24, Attachment 4, at 2.

B. Proceedings in the District Court

The district court held that the placement of the Ten Commandments monument on the lawn of the Elkhart Municipal Building did not violate the Establishment Clause. When analyzing the placement of the monument under the test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971), the court examined (1) whether the City had a secular purpose in maintaining the monument, (2) whether the primary effect of the monument was to advance religion, and (3) whether the City's action fostered an excessive entanglement of government with religion. *See id.* at 612-13. After stating that the third prong did not apply, the court found that Elkhart had a secular purpose for the monument. According to the court, the City's purpose in accepting the monument, promoting morality in youths, is a legitimate aim of government and is a traditional part of the police powers of the state. Also, the court stated, the City's purpose in continuing to display the monument, to maintain exhibits of cultural and historical significance on City property, is also secular.

The court also discussed whether the monument had the effect of endorsing religion. It noted that this question is asked from the perspective of a reasonable observer who is charged with knowledge of the history and context of the display. The court stated that a reasonable observer looking at the monument would know that the Ten Commandments has both religious and historical significance and would acknowledge the significance of the religious symbols on the monument as signs of the major religions of this country at the time of the monument's donation. The court next pointed out that a reasonable observer would view the Ten Commandments monument as part of the City's overall

collection of displays of historical and cultural significance. As the court explained, the lawn in front of the Municipal Building is small, and the City could not be expected to put all of its displays in one place. The court then held that it does not violate the Establishment Clause for the City of Elkhart to acknowledge the importance of the Ten Commandments in the legal and moral development of the nation by displaying the monument on the lawn of the Municipal Building.[5]

II

DISCUSSION

A. Standard of Review

We review de novo the decision of the district court to grant summary judgment. *See Wright v. Illinois Dep't of Corrections*, 204 F.3d 727, 729 (7th Cir. 2000). Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In determining whether a genuine issue of material fact exists, we must review the record in the light most favorable to the plaintiffs and make all reasonable inferences in their favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Here, the parties do not dispute the material facts, so we shall review de novo the district court's conclusions of law. *See Freedom From Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 490 (7th Cir. 2000).

B. Standing

1. _____

[5] The district court also analyzed the placement of the Ten Commandments under several other "tests." Because we believe that the *Lemon* test, as refined by Supreme Court precedent, still controls our Establishment Clause jurisprudence, we will not discuss the other tests mentioned by the district court.

Under Article III of the Constitution of the United States, a plaintiff must have standing to bring an action before a federal court. To have standing, the Supreme Court has explained, the plaintiff must allege (1) that he has suffered an injury in fact (2) that is fairly traceable to the action of the defendant and (3) that will likely be redressed with a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). Here, the dispute centers on the first element: whether the plaintiffs suffered an injury in fact by the City's display of the Ten Commandments on government property.

To allege adequately an injury in fact, a plaintiff must show "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (citations and quotation marks omitted). In the context of the Establishment Clause, our cases have required that, to allege properly that a plaintiff has suffered an injury in fact from the display of a religious object, the individual may show he has undertaken a special burden or has altered his behavior to avoid the offensive object. *See, e.g., Freedom From Religion Found.*, 203 F.3d at 489 (avoids using the park); *Gonzales v. North Township*, 4 F.3d 1412, 1416-17 (7th Cir. 1993) (avoids area of the park); *Harris v. City of Zion*, 927 F.2d 1401, 1405 (7th Cir. 1991) (alters travel routes); *Doe v. Village of Crestwood*, 917 F.2d 1476, 1478 (7th Cir. 1990) (will stay away from festival); *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 269 (7th Cir. 1986) (alters behavior by detouring); *Doe v. Small*, 726 F. Supp. 713, 718-19 (N.D. Ill. 1989), *rev'd en banc on other grounds*, 964 F.2d 611 (7th Cir. 1992) (avoids using park).

The district court here, however, relied on *Doe v. County of Montgomery*, 41 F.3d 1156 (7th Cir. 1994), to determine whether the plaintiffs had suffered an injury in fact even though they had not altered their behavior to avoid the Ten Commandments monument. In *Doe,* a permanent metal sign, hanging over the main entrance of the county's courthouse, read: "THE WORLD NEEDS GOD." The plaintiffs were residents of the county and wished to avoid the sign; however, in order to participate as citizens of their county and to fulfill certain legal obligations, they needed to use the courthouse.

They alleged that they had to come in direct and unwelcome contact with the sign when using the courthouse. In that case, we held that the plaintiffs' allegations that they must come in direct and unwelcome contact with the religious display to participate fully as citizens of their county and to fulfill their legal obligations were sufficient to show that they had suffered an injury in fact. *See id.* at 1159. As we stated, "direct and unwelcome exposure to a religious message cannot be distinguished from the 'injuries' of other plaintiffs who have had standing to bring claims under the Establishment Clause." *Id.* at 1159. We then noted that both the Supreme Court and this court have found standing for constitutional challenges to religious conduct when the plaintiffs did not assume a special burden or alter their behavior. *See Lee v. Weisman*, 505 U.S. 577, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992) (student and parent objected to planned invocations and benedictions at non-mandatory graduation ceremonies); *Wallace v. Jaffree*, 472 U.S. 38, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985) (school children and parents objected to one-minute period of silence); *Stone v. Graham*, 449 U.S. 39, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980) (per curiam) (students and parents objected to posting of Ten Commandments); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 205, 224 n.9, 10 L. Ed. 2d 844, 83 S. Ct. 1560 (1963) (school children and parents objected to reading of Bible in school although students could chose to be absent at time or to not participate); *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160, 1164 n.4 (7th Cir. 1993) (parent of school children objected to distribution of Gideon Bibles in the schools); *Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Township*, 980 F.2d 437, 441 (7th Cir. 1992) (student objected to recitation of Pledge of Allegiance).

The district court followed the holding of *Doe* and noted that the plaintiffs had alleged that they must come in direct and unwelcome contact with the Ten Commandments monument to participate fully as citizens of Elkhart and to fulfill their legal obligations. The court questioned whether the plaintiffs *had* to look at the monument to enter the Municipal Building, as the plaintiffs in *Doe had* to see the sign over the main entrance to enter the county courthouse, but found that the facts were sufficiently close to fit within the rule of *Doe.*

Therefore, the plaintiffs had standing to challenge the placement of the monument in front of the Municipal Building.

2.

The plaintiffs bear the burden of establishing that they have standing to bring this action. *See Doe,* 41 F.3d at 1159. To meet that burden, plaintiffs Books and Suetkamp both allege that they must come in direct and unwelcome contact with the Ten Commandments monument to participate fully as citizens of Elkhart and to fulfill certain legal duties. Moreover, they each allege specific examples in which they have entered the Municipal Building to participate as a citizen of Elkhart or to fulfill a legal obligation.

According to the City, the plaintiffs must alter their behavior to avoid the Ten Commandments monument before they can allege that they have suffered an injury in fact. In Doe, the City submits, the plaintiffs wished to avoid the religious sign above the courthouse's main entrance but could not do so if they wished to use the courthouse and to participate as citizens of the county. Here, the City argues, the plaintiffs could have entered the Municipal Building through alternative entrances, or, even if entering through the main entrance, they could have passed along the back of the Ten Commandments monument. Because of these two options, the City contends, the plaintiffs did not *need* to come in direct and unwelcome contact with the text on the Ten Commandments monument in order to participate as citizens of Elkhart or to fulfill their legal obligations. Thus, the City asserts, the plaintiffs have not alleged that they suffered an injury in fact by the placement of the Ten Commandments monument on the lawn of the Municipal Building.

3.

As this court discussed in *Doe,* the Supreme Court has addressed the requirements for standing when a plaintiff must view a religious symbol in his daily routine or when he is forced to come in contact with religious conduct through participation in school or in government. *See Doe,* 41 F.3d at 1160. As we demonstrated in *Doe,* our holding in that case is grounded firmly in the precedent of the Supreme Court.

Therefore, we must conclude that the plaintiffs have standing to challenge the placement of the Ten Commandments monument on the lawn of the Municipal Building.

We agree with the district court that there is no principled distinction between the facts of *Doe* and the facts presented here. In *Doe,* the plaintiffs were required to come in direct and unwelcome contact with the religious display in order to participate fully in government and to fulfill their legal obligations. Here, the plaintiffs must do the same. Although it is true that the plaintiffs here could have altered their path into the Municipal Building to avoid the monument, an act that would have given them standing under Seventh Circuit precedent, *see, e.g., Freedom From Religion Found.*, 203 F.3d at 489; *City of St. Charles*, 794 F.2d at 269, they were not obligated to do so to suffer an injury in fact, *see Doe*, 41 F.3d at 1160-61. Moreover, because the plaintiffs are aware of the words written on the front of the monument, merely walking behind it will not eradicate the injury they allegedly suffered by passing the Ten Commandments monument. We therefore conclude that a plaintiff may allege an injury in fact when he is forced to view a religious object that he wishes to avoid but is unable to avoid because of his right or duty to attend the government-owned place where the object is located. *See Doe*, 41 F.3d at 1159-61. Therefore, the plaintiffs have alleged sufficient facts to demonstrate that they suffered an injury in fact by the placement of the Ten Commandments monument on the lawn of the Municipal Building.

C. Governing Principles and Application

Although various members of the Supreme Court of the United States have criticized it,[6] the test first enunciated by

[6] *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 120 S. Ct. 2266, 2284-85, 147 L. Ed. 2d 295 (2000) (Rehnquist, C.J., dissenting) (stating that *"Lemon* has had a checkered career in the decisional law of this Court" and collecting opinions criticizing *Lemon); Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-99, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993) (Scalia, J., concurring in judgment) (comparing *Lemon* to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried"

the Court in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971), remains the prevailing analytical tool for the analysis of Establishment Clause claims. As an intermediate federal appellate court, we are obliged by the doctrines of stare decisis and precedent to employ that methodology unless instructed otherwise by the Supreme Court.[7] *See, e.g., Freedom From Religion Found.*, 203 F.3d at 493 (emphasizing Lemon test in Establishment Clause analysis); *Bridenbaugh v. O'Bannon*, 185 F.3d 796, 797 (7th Cir. 1999) (same); *Tanford v. Brand*, 104 F.3d 982, 986 (7th Cir. 1997) (same); *Kerr v. Farrey*, 95 F.3d 472, 476-80 (7th Cir. 1996) (same); *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680, 685-86 (7th Cir. 1994) (same); *Sherman v. Community Consolidated School District 21*, 8 F.3d 1160 at 1163-64 (same). Under the approach mandated by *Lemon*, we must consider: (1) whether the government activity in question has a secular purpose, (2) whether the activity's primary effect advances or inhibits religion, and (3) whether the government activity fosters an excessive entanglement with religion. *See Lemon*, 403 U.S. at 612-13. Governmental

and then collecting opinions criticizing *Lemon); County of Allegheny*, 492 U.S. at 655-56 (Kennedy, J., concurring in the judgment in part and dissenting in part) (stating that, although he found the *Lemon* test useful in judging the constitutionality of holiday displays, he did "not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area"); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671, 63 L. Ed. 2d 94, 100 S. Ct. 840 (1980) (Stevens, J., dissenting) (desiring to avoid "continuing with the sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon*" (citation omitted)).

[7] *See State Oil v. Khan*, 522 U.S. 3, 20, 139 L. Ed. 2d 199, 118 S. Ct. 275 (1997) (stating that the "Court of Appeals was correct in applying [the doctrine of stare decisis] despite disagreement with [a prior Supreme Court opinion], for it is this Court's prerogative alone to overrule one of its precedents"); *Agostini v. Felton*, 521 U.S. 203, 217, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997) (reminding appellate courts that "the views of five Justices that [a] case should be reconsidered or overruled cannot be said to have effected a change in Establishment Clause law"); *see also DeWalt v. Carter*, 224 F.3d 607, 617 n.5 (7th Cir. 2000).

action is violative of the constitutional prohibition against the establishment of religion if it violates any one of these three prongs. *See Edwards v. Aguillard*, 482 U.S. 578, 583, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987). In this case, the plaintiffs do not contend that the display of the monument involves an excessive entanglement with religion; therefore, we shall confine our discussion to the first two prongs of the analysis.

Before turning to the situation before us, we also note that, in more recent cases, the Supreme Court has, on occasion, articulated these first two prongs in terms of an "endorsement" test. *See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 592, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989) (formally accepting the endorsement test and stating that "in recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence"); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 120 S. Ct. 2266, 2278, 147 L. Ed. 2d 295 (2000) (asking whether the state endorsed religion by allowing a student to lead a prayer to open high school football games); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763-65, 132 L. Ed. 2d 650, 115 S. Ct. 2440 (1995) (acknowledging endorsement test but stating that it did not apply in the case at hand because the correct analysis for private religious speech in a public forum was under the Free Speech Clause). As we noted recently in *Freedom From Religion Foundation*, "under this test, 'the effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.'" 203 F.3d at 493 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984) (O'Connor, J., concurring)).

1.

The first part of our inquiry must be to determine whether the display of this tablet by the City of Elkhart has the primary purpose of "advancing or inhibiting religion." *Agostini v. Felton*, 521 U.S. 203, 222-23, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997). As the Court has explained, "The purpose prong of the Lemon test asks whether the government's actual purpose

is to endorse or disapprove of religion.'" *Aguillard*, 482 U.S. at 585 (quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)). In determining whether this particular display of the Ten Commandments can be said to have a valid secular purpose, we must evaluate the totality of the circumstances surrounding the placement and maintenance of the monument.

As a starting point, we do not think it can be said that the Ten Commandments, standing by themselves, can be stripped of their religious, indeed sacred, significance and characterized as a moral or ethical document. Indeed, the Supreme Court made this point clear in *Stone v. Graham*, 449 U.S. 39, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980), when it noted that a simple reading of the Ten Commandments does not permit us to ignore that they transcend "arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day." *Id.* at 41-42 (citations omitted). Indeed, when one goes beyond the text itself and regards this particular display, the religious nature of the document is emphasized by the very format of the monument. Notably, the prefatory words "I am the Lord thy God" are set out in large lettering at the top of the text. R.29 & 31, Ex.5. This religious format is enhanced, not detracted from, by the etchings at the bottom of the tablet of the Stars of David and the Chi Rho symbol, a distinctive Christian symbol. It cannot be doubted, therefore, that this monument bearing the Ten Commandments possesses a religious nature.

The display of a religious symbol still may, under certain circumstances, have a secular purpose. The text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order. For example, on the wall of the Supreme Court there is a frieze that contains Moses holding the Ten Commandments. The frieze contains depictions of two other religious figures, Confucius and Mohammed, but it also includes Caesar Augustus, William Blackstone, Napol'on Bonaparte, and John Marshall. Justice Stevens has stated that the placement of all

of these historic figures together on the frieze signals a respect for great lawgivers, not great proselytizers. *See County of Allegheny*, 492 U.S. at 652 (Stevens, J., concurring in part and dissenting in part). This is a fitting message, he tells us, for the wall of a courtroom. *See id.* at 653. A display is unconstitutional, according to Justice Stevens, "only when its message, evaluated in the context in which it is presented, is nonsecular." *Id.* at 652. Indeed, the Court in *Stone* emphasized that the challenged statute that required the posting of the Ten Commandments on schoolroom walls did not present "a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." 449 U.S. at 42.

The Supreme Court has stressed the importance of the context of a clearly religious symbol in determining whether the purpose in displaying the symbol is religious or secular. We also have emphasized that religious symbols should not be considered in the abstract; instead, courts must ask "whether the particular display at issue, considered in its overall context, could be said to advance religion." *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 125 (7th Cir. 1987).

Here, the record discloses no significant attempt by the City of Elkhart to present the text of the Ten Commandments in a way that might diminish its religious character.[8] Indeed, the history of the City's involvement in the placement of this particular monument serves to emphasize a religious purpose in its display. As we have noted already, the original impetus behind the proliferation of the Ten Commandments monuments was Judge Ruegemer's desire to provide youths with a common code of conduct that they could use to govern their actions. In accepting the monument, the City also aimed to provide a code of conduct for the citizens of Elkhart to follow. The code chosen, however, was a religious code that

[8] Given the obvious religious nature of the text itself, it falls to the City of Elkhart to demonstrate that it has taken steps to "obviate its religious purpose." *Gonzales v. North Township*, 4 F.3d 1412, 1421 (7th Cir. 1993); *see also Bridenbaugh v. O'Bannon*, 185 F.3d 796, 798 (7th Cir. 1999); *Metzl v. Leininger*, 57 F.3d 618, 621 (7th Cir. 1995).

focuses not only on subjects that are the legitimate concern of civil authorities, but also subjects that are beyond the ken of any government and that address directly the relationship of the individual human being and God. That the purpose was to endorse, through governmental sponsorship, a code of religious values is further established by the program of speakers at the dedication of the monument: a Protestant minister, a Catholic priest, and a Jewish rabbi. When these religious leaders spoke, the first speaker urged Americans to accept the precepts of the Ten Commandments because they could provide redemption from strife and fear. The second speaker stated that the Ten Commandments should be engraved not only in stone but in the hearts, minds, and consciences of everyone. Finally, the last speaker recommended that the dedication of the monument should be an occasion for the dedication of everyone to the high ideals inherent in the American way of life. The participation of these influential members of several religious congregations makes it clear that the purpose for displaying the monument was not only to provide youths with a common code of conduct to guide their participation in the civil community but also to urge the people of Elkhart to em brace the specific religious code of conduct taught in the Ten Commandments. Thus, in applying the purpose prong of Lemon, the inherently religious nature of the Ten Commandments is strengthened by the circumstances surrounding the display of the monument. We cannot escape the conclusion that the purpose in displaying this monument was to promote religious ideals.

Moreover, nothing in the subsequent history of the monument can be said to have in any way transformed that religious purpose. The City's resolution, issued on the eve of this litigation and proclaiming a secular purpose for the monument's presence by recognizing the historical and cultural significance of the Ten Commandments, ought to be accorded no more weight than the avowed secular legislative purpose articulated by the Kentucky legislature in *Stone.* In *Stone,* the Kentucky statute required the following language at the bottom of each Ten Commandments display: "'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'" 449 U.S. at 41 (quoting

1978 Ky. Acts 436, § 1, Ky. Rev. Stat. Ann. § 158.178 (1980)). The Supreme Court responded to this statement of purpose by stating that "such an 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment." *Id.; see also Santa Fe Indep. Sch. Dist.,* 120 S. Ct. at 2278 (reiterating that a governmental entity's professed secular purpose for an arguably religious policy is entitled to some deference but that it is the duty of the courts to ensure that the purpose is sincere); *Aguillard,* 482 U.S. at 586-87 (stating that courts should normally defer to a state's articulation of a secular purpose, but the statement of such purpose must be sincere). As we noted in *Gonzales,* 4 F.3d at 1419, although this court "will defer to a municipality's sincere articulation of a religious symbol's secular purpose," we shall not accept a stated purpose that merely seeks to avoid a potential Establishment Clause violation. Similarly, we hold that the City of Elkhart's avowed secular purpose of recognizing the historical and cultural significance of the Ten Commandments, issued on the eve of litigation, "is not sufficient to avoid conflict with the First Amendment." *Stone,* 449 U.S. at 41. We therefore hold that the purpose of displaying the Ten Commandments monument was not secular. The display of the monument, consequently, violates the first prong of the *Lemon* test and cannot survive Establishment Clause scrutiny.

2.

Even if we were to ignore the primary purpose behind displaying the Ten Commandments monument, we would have to conclude that this particular display has the primary or principal effect of advancing religion. In *County of Allegheny,* the Court noted that, under this prong, courts have a special responsibility to ensure that a government-sponsored display does not have the purpose or the effect of endorsing a religion. *See* 492 U.S. at 592. As we noted recently in *Freedom of Religion Foundation,* "under this test, 'the effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.'" 203 F.3d at 493 (quoting *Lynch,* 465 U.S. at 690 (O'Connor, J., concurring)). When employing this analytical approach, we are charged with the responsibility of assessing the totality of the circumstances surrounding the display to determine whether a reasonable person would believe

that the display amounts to an endorsement of religion. *See County of Allegheny*, 492 U.S. at 597 (stating that "the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends on its context").

In *County of Allegheny,* the plaintiffs challenged the recurring holiday displays of a creche placed on the Grand Staircase inside the county courthouse and of a Chanukah menorah placed outside the city-county building. The Court held that the placement of the creche violated the Establishment Clause. The creche in question was surrounded on three sides by a wooden fence. Along the fence sat poinsettias, and on each of the two ends of the fence was a small evergreen tree. A plaque was attached to the fence that announced that the display had been donated by the Holy Name Society. The creche was used as the setting for weekday Christmas caroling by local musical groups. The Court noted that the creche was capable of communicating a religious message, but then explained that "the effect of a creche display turns on its setting" because "the context of the display [could] detract[ ] from the creche's religious message." *Id.* at 598. In assessing the context surrounding the creche in *County of Allegheny,* the Court determined that nothing detracted from its religious message. The floral border drew one's attention to the display, and the fact that traditional Christmas flowers were used further contributed to the perception of the endorsement of religion by the government. The sign disclosing ownership by a Catholic organization further enhanced the perception that the government was promoting a religious message. The Court also noted that the creche was displayed on the main and most beautiful part of the building and that the building served as the seat of government. According to the Court, "no viewer could reasonably think that it occupies this location without the support and approval of the government." Therefore, concluded the Court, "by permitting the 'display of the creche in this particular physical setting,' the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the creche's religious message." *Id.* at 599-600 (quoting *Lynch,* 465 U.S. at 692 (O'Connor, J., concurring)). The Court therefore held that the creche display

violated the Establishment Clause.

In *County of Allegheny,* a majority of the Court also held that the menorah placed in front of the city-county building did not violate the Establishment Clause. The menorah was placed next to a 45-foot pine tree that was decorated with lights and ornaments. At the foot of the tree rested a sign that bore the mayor's name and a text that was entitled "Salute to Liberty." The Court held that this particular display was not a violation of the Establishment Clause because its specific setting did not have the primary effect of endorsing religion. Instead, the Court stated that the combination of the now-secularized Christmas tree with a sign extolling liberty and the giant menorah tended to promote the winter-holiday season. The display, held the Court, did not violate the Establishment Clause.

In fulfilling our responsibility to apply faithfully the Establishment Clause jurisprudence of the Supreme Court of the United States, we have subjected to particularly careful scrutiny displays at the seat of government. We have taken this course because "an important concern of the effects test is . . . 'whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.'" *American Jewish Congress*, 827 F.2d at 127 (quoting *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 390, 87 L. Ed. 2d 267, 105 S. Ct. 3216 (1985)). In *American Jewish Congress,* the City of Chicago had displayed a creche during the holiday season in the lobby of the city-county building. We noted that the seat of government is "a setting where the presence of government is pervasive and inescapable." *Id.* 827 F.2d at 126. We then held that the display violated the second prong of *Lemon* "because City Hall is so plainly under government ownership and control, every display and activity in the building is implicitly marked with the stamp of government approval." *Id.* at 128. In that case, the presence of the creche in the lobby of the seat of government created "a clear and strong impression that the local government tacitly endorsed Christianity." *Id.*

We reiterated this principle in *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991). In *City of Zion,* the plaintiffs challenged the seal of two cities because they contained symbols of Christianity, the Latin cross. We stated that the cities' seals containing the Latin cross presented unambiguous endorsements of religion in violation of the Establishment Clause. *See id.* at 1412. "Depicting these patently religious symbols on a corporate seal that is wholly owned and controlled by the City connotes the City's approval for the message conveyed." *Id.* at 1414. This endorsement, we held, violated the Establishment Clause. Moreover, we noted, the finding of a constitutional violation was even more compelling in this situation because the seals were "a permanent statement that [was] viewed year-round." *Id.* at 1412.

In assessing the situation before us, we must ask whether an objective observer familiar with the history and placement of the Ten Commandments monument would perceive it as a state endorsement of religion. *See Santa Fe Indep. Sch. Dist.*, 120 S. Ct. at 2278. We note first that the monument is displayed at the seat of government. As we have just explained, the seat of government "is so plainly under government ownership and control" that every display on its property is marked implicitly with governmental approval. *American Jewish Congress*, 827 F.2d at 128. Here, in front of the building that houses the governmental departments of the City, stands a religious message. This granite monument is a permanent fixture on the grounds of the seat of government. As viewed by the passer-by or by an individual approaching the building, the monument certainly cannot be fairly characterized as a component of a comprehensive display of the cultural heritage of the people of Elkhart. Rather, it stands, as the City intended it to be when it dedicated the monument on Memorial Day in 1958, as a sole and stark reminder of the specific injunctions contained in the Commandments. Indeed, the surrounding area enhances the dignity and the primacy of the Commandments. Above the door of the Municipal Building are the Latin words "Dedicatum Justitia." Those who view the Ten Commandments are thus informed that the role of the government in that location is to do justice; the only "law" displayed for doing justice is the monument bearing the Ten Commandments. The only other display on the lawn

of the Municipal Building is the War Memorial that reminds the onlooker that the space in front of the Municipal Building is "hallowed ground." R.29 & 31, Ex.25.[9] The person approaching the seat of government is thus informed that, at that location, the government goes about the business of doing justice, that the only "law" displayed is the Commandments, and that these Commandments are displayed on land designated by the government as "hallowed ground."

The format of the monument itself hardly dilutes its religious message. Indeed, this monument impermissibly suggests that, in this community, there are "ins" and "outs." The monument contains the Stars of David and the symbol of Christ, representing respectively Judaism and Christianity, two of the religions no doubt particularly represented in the Elkhart community, but by no means the total of all those who depend on the City of Elkhart as their local government. The Supreme Court has cautioned that government "sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and the accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe Indep. Sch. Dist.*, 120 S. Ct. at 2279 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)).

In this regard, the placement of the American Eagle gripping the national colors at the top of the monument hardly detracts from the message of endorsement; rather, it specifically links religion, or more specifically these two religions, and civil government. *See City of Zion*, 927 F.2d at 1412 (holding that a Latin cross surrounded by other symbols of city life on the city's corporate seal only served to show that the city approved of certain aspects of city life, among them Christianity).

Finally, we cannot say that the monument's

[9] As stated above, the Freedom Monument reads: "BEHOLD FRIEND, YOU ARE NOW ON HALLOWED GROUND FOR HERE BURNS FREEDOMS HOLY LIGHT." R.29 & 31, Ex.25.

acknowledgment of two religious traditions, rather than one, renders the situation before us in compliance with the strictures of the Constitution. "The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone." *County of Allegheny*, 492 U.S. at 615. Although Elkhart's Ten Commandments monument does not endorse Christianity only, it confines its approval to the Judeo-Christian faiths. As the Supreme Court has stated, the First Amendment is "recognized as guaranteeing religious liberty and equality to 'the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.'" *Id.* (quoting *Wallace*, 472 U.S. at 52). Accordingly, we hold that the primary effect of the Ten Commandments monument on the property of the City of Elkhart's Municipal Building is to advance or endorse religion. The display, consequently, fails the second prong of the *Lemon* test and violates the Establishment Clause.

3.

This case was decided by the district court on cross-motions for summary judgment. Now that we have reversed the district court's grant of summary judgment for the defendants, the district court ought to enter summary judgment for the plaintiffs. The district court must then turn to the question of remedy. In fashioning a remedy, the district court must be guided by the basic rule that the nature of the remedy ought to be determined by the nature and the scope of the constitutional violation. *See Milliken v. Bradley*, 433 U.S. 267, 280, 53 L. Ed. 2d 745, 97 S. Ct. 2749 (1977). It must also proceed in a manner that respects the interests of state and local authorities to manage their own affairs in a manner consistent with the Constitution of the United States. *See id.* at 280-81.

In crafting equitable relief to comply with our judgment today, the district court must ensure that, although the condition that offends the Constitution is eliminated, Elkhart retains the authority to make decisions regarding the placement of the monument. In making those decisions, Elkhart has the right and, indeed, the obligation to take into consideration the religious sensibilities of its people and to accommodate that aspect of its citizens' lives in any way that does not offend

the strictures of the Establishment Clause. *Cf. Zorach v. Clausen*, 343 U.S. 306, 313, 96 L. Ed. 954, 72 S. Ct. 679 (1952) ("We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group."). Arriving at a realistic solution that comports with the strictures of the Establishment Clause will no doubt take some time, and the district court ought to ensure that Elkhart authorities have a reasonable time to address in a responsible and appropriate manner the task of conforming to the letter and spirit of the constitutional mandate.

Conclusion

Cases involving religion pose difficult questions for courts. "Since undoubtedly we are a 'religious people whose institutions presuppose a Supreme Being,' deep feelings are aroused when aspects of that relationship are claimed to violate the injunction of the First Amendment that government may make 'no law respecting an establishment of religion, or prohibiting the free exercise thereof.'" *Schempp*, 374 U.S. at 230 (Brennan, J., concurring) (citation omitted). This is especially true of cases that require enforcement of the Establishment Clause because that Clause often requires a restriction on religious activity on the part of a government entity and is therefore misperceived as restricting the ability of the community to acknowledge the religious commitment of its people. As our discussion today makes clear, the scope of our Establishment Clause jurisprudence is far more circumscribed. Rather, the Supreme Court's cases, and the decisions of our court in conformity with those precedents of the High Court, simply prevent government at any level from intruding into the religious life of our people by sponsoring or endorsing a particular perspective on religious matters. It prevents, as Justice O'Connor has pointed out, government from creating among our people "ins" and "outs" on the basis of religion. In this latter respect, it acknowledges the very unique religious nature of our people. Few of us can look too far back in our personal histories — and the Country certainly cannot ignore the circumstance of its own birth — without

acknowledging that our ancestors were people who suffered significantly because of their religious belief and who were ostracized by their national communities or made to suffer poverty or even worse because of their religious beliefs. As one visitor to our shores, himself a refugee from Nazi tyranny, put it, Americans can all say, "We are bruised souls." We each carry "the wounds and sorrows of ancestors, and that memory of the sufferings caused by persecution and prejudice which they ieft to their progeny" is our "spiritual patrimony."[10] The Establishment Clause acknowledges that "spiritual patrimony" and requires that we exercise, in our governmental manifestations of the religious nature of our people, a self-restraint that will prevent anyone from becoming in the eyes of our governmental system — an "out" on the basis of religious beliefs.

Accordingly, the judgment of the district court is reversed, and the case is remanded for proceedings in conformity with this opinion.

REVERSED and REMANDED

MANION, *Circuit Judge,* concurring in part and dissenting in part. The court sets out an accurate presentation of the facts at issue in this case. Suffice it to say that in a Memorial Day ceremony in 1958 the Fraternal Order of the Eagles presented to the City of Elkhart a stone monument engraved with a version of the Ten Commandments. The City placed it near the north entrance of the City Hall building where it has remained to this day. The plaintiffs claim that the location of the monument is offensive to them and an unconstitutional endorsement of religion by the City.

I agree with the court's analysis regarding the plaintiffs' standing to challenge the constitutionality of the placement of the Ten Commandments monument. And while I also agree with the court's legal summary of the Lemon test, I disagree with its application of *Lemon* to the facts before us. Rather, applying *Lemon* and its progeny should lead to the conclusion that the City of Elkhart does not violate the Establishment Clause by leaving undisturbed a monument inscribed with

[10] Jacques Maritain, Reflections on America 83-84 (1958).

the Ten Commandments that was erected more than forty years ago. Moreover, even if the monument did not satisfy the *Lemon* test, the Supreme Court has upheld certain religious practices which have become a part of the fabric of our society. Leaving the Ten Commandments monument where it now stands comfortably falls within the historical context of this country and is thus constitutional even though it retains the unequivocal references to God. I therefore CONCUR in part and DISSENT in part.

I.

A.

Lemon Test

In *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971), the Supreme Court adopted a three-part test for analyzing Establishment Clause cases. First, the government's challenged practice must have a secular purpose. Second, the principal or primary effect must be one that neither advances nor inhibits religion. Third, the government's practice must not create an excessive entanglement of religion. As noted by the court, the third prong is not at issue. Accordingly, we focus on the first two prongs of the *Lemon* test.

1. Secular purpose.

Under *Lemon,* the government's challenged practice must have a secular purpose. Thus, in this case, we must ask whether a secular purpose supports the City of Elkhart's decision not to remove the Ten Commandments monument. Elkhart presented as evidence of its secular purpose the resolution which its Common Council adopted on May 4, 1998, following consideration of the plaintiffs' request that the City remove the 40-year-old monument.[11]

[11] WHEREAS, the issue of the Ten Commandments Monument outside Elkhart City Hall has been raised by a person who is represented by the Indiana Civil Liberties Union. The Indiana Civil Liberties Union has contacted the Mayor of the City of Elkhart and has stated that a lawsuit will be filed if the Ten Commandments Monument is not removed. WHEREAS, in recognition of the historical significance of the Ten Commandments, the Fraternal

The Council's resolution, which the Mayor of Elkhart approved on May 13, 1998, identifies several secular purposes justifying the City's decision not to remove the Ten Commandments monument. First, as the City recognized, the Ten Commandments represents one of the earliest codes of human conduct and, as such, it "had a significant impact on the development of the fundamental legal principles of Western Civilization." In fact, the Ten Commandments served as a foundation for the formation of both English Common Law and the Napoleonic Code, which together laid the foundation for American jurisprudence. *See State of Colorado v. Freedom From Religion Foundation, Inc.*, 898 P.2d 1013, 1018 (Col. 1995). *See also, id.* at 1026 (Ten Commandments "monument represents the secular objective intended at the outset, recognition of a historical, jurisprudential cornerstone of American legal significance").

The Common Council's resolution also noted that "the Monument contains symbols that reflect the cross cultural and historical significance of the Ten Commandments," and that the monument serves as a recognition of those roots and the historical significance of the Ten Commandments. These stated justifications are permissible secular purposes even

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Order of Eagles presented the Ten Commandments monument to the City of Elkhart in May, 1958. In addition to the Ten Commandments, the Monument contains symbols that reflect the cross cultural and historical significance of the Ten Commandments. WHEREAS, the Ten Commandments Monument has stood outside in an unobtrusive location to the north of the entrance of City Hall since 1958. There are numerous other historical and cultural plaques, memorials, and monuments located south of the entrance of city hall, in the foyer just inside the city hall entrance, at the first floor open area of city hall, and at the second and third floor open areas of city hall; and WHEREAS, the Ten Commandments have had a significant impact on the development of the fundamental legal principles of Western Civilization. NOW, THEREFORE, BE IT RESOLVED BY THE COMMON COUNCIL OF THE CITY OF ELKHART, INDIANA, THAT: The Ten Commandments Monument is a historical and cultural monument that reflects one of the earliest codes of human conduct. It is proper for the Ten Commandments Monument to remain and the defense of this position is strongly endorsed.

though a religious symbol is used to accomplish them. *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 34 (10th Cir. 1973) (Ten Commandments monument stands as "a depiction of a historically important monument with both secular and sectarian effects"). *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 691, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984) (O'Connor, J., concurring) ("celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose"); *id.* at 680 ("The creche in the display depicts the historical origins of the traditional event long recognized as a National Holiday. . . . The display is sponsored by the City to celebrate the Holiday and to depict the origins of that Holiday."); *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 126-27 (7th Cir. 1987) (recognizing that a city's tradition in "taking official note of Christmas" and acknowledging public sentiment in favor of the nativity scene are permissible secular purposes justifying creche display). The fact that the Ten Commandments refers to God, and that all of the world's major monotheistic religions have the Ten Commandments as basic tenets of their faith, does not alter the monument's secular purposes. *See, e.g., American Jewish Congress*, 827 F.2d at 126 (to serve a secular purpose, the government's purpose need not be unrelated to religion). *Cf. Bridenbaugh v. O'Bannon*, 185 F.3d 796, 799-800 (7th Cir. 1999) (the fact that a secular holiday coincides with a day that has religious significance for Christians does not defeat the secular purpose justifying the state holiday).

The court acknowledges the validity of Elkhart's asserted secular purposes, stating "the text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order." Opinion at 19. And in this case, Elkhart has explicitly stated in its resolution that it was leaving standing the Ten Commandments monument in order to recognize their "significant impact on the development of the fundamental legal principles of Western Civilization." Yet the court concludes that "the purpose in displaying the Ten Commandments monument was not secular." Opinion at 22. How can the court on one hand recognize the legitimacy of this purpose and on the other conclude that Elkhart lacks a legitimate secular purpose for leaving the Ten Commandments

monument in place? Apparently, the court just doesn't believe that the City of Elkhart's statement of secular purposes is sincere and not a sham. *Edwards v. Aguillard*, 482 U.S. 578, 586-87, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987) ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.").

But there is no evidence that the Common Council's resolution was a sham, and absent some evidence that the Common Council's stated reasons for its decision not to remove the monument are insincere, we should defer to those asserted justifications. *Cohen v. City of Des Plaines*, 8 F.3d 484, 489 (7th Cir. 1993). *See also American Jewish Congress*, 827 F.2d at 127 ("In the absence of any evidence that the city's stated purposes behind the display of the nativity scene are merely a sham, we must conclude that the 1985-86 display had no invidious purpose.") (internal citation omitted). "This is in keeping with the well settled maxim that courts are 'reluctant to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute.'" *Cohen*, 8 F.3d at 489-90 (quoting *Mueller v. Allen*, 463 U.S. 388, 394-95, 77 L. Ed. 2d 721, 103 S. Ct. 3062 (1983)). "This is true whether the governing body is a state legislature or a city council." *Cohen*, 8 F.3d at 489. Accordingly, rather than assume the Common Council is insincere about its motivations, we are obligated to do just the opposite — assume they are being truthful.

The court seemingly relies on the timing of the resolution (noting that it was passed on the eve of litigation) as evidence that the resolution was insincere. But the timing is totally reasonable. Before the plaintiffs objected to the monument and threatened to sue the City, it had rested unobtrusively on the lawn along with other monuments for nearly forty years, so there was never a need for the Common Council to declare its reasons for allowing the monument to remain. It was not until the plaintiffs demanded that Elkhart remove the monument that it became an issue. At that point the currently governing Common Council convened to consider the plaintiffs' demands and decided against removing the monument, stating its reasons in the resolution. Given these

circumstances, there is nothing suspect about the timing. In fact, in other Establishment Clause cases, this court has relied on the secular purposes proffered during *litigation*, notwithstanding the timing of the state's explanation. *See Bridenbaugh*, 185 F.3d at 799 (relying on testimony offered during litigation as to Indiana's purpose for giving employees a Good Friday holiday); *American Jewish Congress*, 827 F.2d at 127 (relying on affidavit of chief of staff as to the purpose behind creche display and noting that in the absence of any evidence that the city's stated purpose behind the display was a sham, the court would have to conclude there was no invidious purpose). In those cases we held that, absent any evidence that the stated justification was a sham, we would take the government at its word. Since there is no evidence of an invidious motive here, we should take the Common Council at its word, as set forth in the resolution.

Moreover, even if the City had a religious purpose in displaying the Ten Commandments, that would not destroy the City's other valid secular purposes. "A law that promotes religion may nevertheless be upheld . . . because of the secular purposes that the law also serves. . . ." *Metzl v. Leininger*, 57 F.3d 618, 620 (7th Cir. 1995). Accordingly, Elkhart need have only one secular purpose justifying its decision in order to satisfy *Lemon's* first prong. It has presented several secular justifications. Therefore, even if Elkhart, in part, wanted to promote the religious aspects of the Ten Commandments, that does not negate its other valid secular justifications for leaving the monument alone. *Bridenbaugh*, 185 F.3d at 800 ("[A] secular purpose need not be the exclusive one; it was sufficient if the government had 'a secular purpose.'") (emphasis added). *See also, Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1345 (4th Cir. 1995) ("In determining whether the [display] has a secular purpose, we note that this first prong of the *Lemon* test is a fairly low hurdle. A legislative enactment has no secular purpose only if 'there [is] no question that the [display] or activity was motivated wholly by religious consideration.'") (quoting *Lynch*, 465 U.S. at 680).

The court highlights the speeches made when the monument was dedicated in 1958 as proof of Elkhart's religious purpose in displaying the Ten Commandments. While the

speeches made by the various religious leaders were solemn — in line with the occasion — they did not evidence a religious purpose. In fact, those speeches lacked anything near the religious fervor of the legislative statements made in connection with other practices adopted in the 1950's and upheld by the various circuits notwithstanding the sponsors' overtly religious messages. *See infra* at 59-62. Recall that the Elkhart monument was unveiled on Memorial Day as part of the City's festivities. Participation in that celebration by religious leaders with speeches that had a religious tone is both understandable and acceptable. As recently as 1998, Congress recognized that Memorial Day is a day "during which the people may unite in prayer for permanent peace," and that the President should call "on the people of the United States to observe Memorial Day by praying, according to their individual religious faith, for permanent peace." 36 U.S.C. § 116 (1998). Furthermore, even if the various religious leaders' speeches demonstrated that *they* gladly accepted Elkhart's decision to display the monument because of the monument's religious message, the religious leaders were not the *City*, and it is only the City's intent that matters.

The speeches, in short, provide little guidance as to Elkhart's original purpose in accepting the monument donated by the Fraternal Order of Eagles. To the extent that the original purpose would matter, *see infra* at 43, the evidence presented at the summary judgment stage indicates that the City accepted the Ten Commandments monument from the Eagles (a civic, non-religious organization) in order to further the Eagles' goal of providing "youths with a common code of conduct that they could use to govern their actions," and "showing these youngsters that there were such recognized codes of behavior to guide them." Providing youth with a common code of conduct is a valid secular purpose. *See Freedom From Religion Foundation*, 898 P.2d at 1023 ("The monument was donated as part of the National Youth Guidance Program, whose purpose was secular in nature. Such secular intent of the donation is logical in light of the historical fact that the Ten Commandments have served over time as a basis for our national law.").

The court claims that this purpose was not secular because the City chose a religious code to further its goal. But as the

Supreme Court recognized in *Lynch*, a religious symbol can be used to further the secular goal of celebrating both a religious and secular holiday, such as Christmas. Likewise, Elkhart can permissibly choose the Ten Commandments, which includes both religious and secular rules of conduct, to further its secular goal of providing youth with an example of a code of conduct. In fact, it is only logical that when Elkhart chose an example of a "common code of conduct" to display, it chose one that would be recognized by its citizens, and especially children, and there can be no doubt that the Ten Commandments is the most well-known and recognizable code of conduct to Americans, as opposed to, say, the Napoleonic Code or the Code of Hammurabi.[12]

In any event, the Ten Commandments monument was donated to Elkhart over forty years ago. What matters, however, is not the City's purpose in 1958 — when Elkhart could constitutionally have a religious purpose — but the City's purpose today. *Bridenbaugh*, 185 F.3d at 799 (original reason for choosing Good Friday as state holiday is not dispositive); *Metzl v. Leininger*, 57 F.3d 618, 621 (7th Cir. 1995) (state's religious purpose 53 years ago may accrue a secular justification and essentially eliminate any purpose of promoting religion); *American Jewish Congress*, 827 F.2d at 126 (Mayor's comment in 1959 that "We are a Christian Nation," and that "the more religion we can get in politics, the better off we are," while relevant to the original purpose of nativity scene reveals little about purpose behind the 1985-86 display). In its resolution, Elkhart explained its current reasons for leaving undisturbed the Ten Commandments monument: to recognize the historical and cross-cultural significance of the Ten Commandments; to acknowledge the significant impact the Ten Commandments had on the development of

[12] The frieze contained on the south wall of the courtroom of the United States Supreme Court includes a procession of great lawgivers of history, including Hammurabi, the Babylonian king who developed the Code of Hammurabi, and Napoleon Bonaparte, *Suhre v. Haywood County*, N.C., 55 F. Supp. 2d 384, 393, 395 (W.D.N.C. 1999), figures possibly recognizable to the learned lawyers arguing before the Supreme Court, but unlikely familiar to many laypersons.

the fundamental legal principles of Western civilization; and to retain an historical and cultural monument that displays one of the earliest codes of human conduct. Those reasons are permissible secular justifications, *see supra* at 37-39, and therefore Elkhart has satisfied *Lemon's* first prong.

2. Principal or primary effect.

The second prong of *Lemon* considers whether the government's practice has the principal or primary effect of advancing or inhibiting religion. *Freedom of Religion Foundation v. City of Marshfield*, 203 F.3d 487, 493 (7th Cir. 2000). Under this prong, the question is "irrespective of government's actual purpose, [does] the practice under review in fact convey [ ] a message of endorsement or disapproval." *Id.* (internal quotations omitted). As the court recognizes, to analyze this prong we must assess the totality of the circumstances surrounding the display to determine whether a reasonable person would believe that the display amounts to an endorsement of religion. This is a fact-specific inquiry.

The court's conclusion that, based on all of the circumstances, Elkhart's decision to leave standing the Ten Commandments monument constitutes an endorsement of religion seems to be at odds with the Supreme Court's decisions in *Lynch* and *Allegheny*. *In Lynch v. Donnelly*, 465 U.S. 668, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984), the Supreme Court considered the constitutionality of the city of Pawtucket, Rhode Island's display of a creche at Christmas. In applying the second prong of the *Lemon* test, the Court initially noted that the district court had "plainly erred by focusing almost exclusively on the creche." *Lynch*, 465 U.S. at 686. Rather, according to the Court, the appropriate question was whether the nativity scene, while religious, could be said to advance religion. The Court held that given the overwhelmingly secular character of the Pawtucket display, "the inclusion of a single symbol of a particular historic religious event . . . [did not] so 'taint' the city's exhibit as to render it violative of the Establishment Clause." *Id.* The display in *Lynch* included not just the creche, but also a Santa Clause house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing clowns, an elephant and a teddy bear, hundreds of colored lights and a banner reading "Season's

Greetings." *Id.* at 671.

Five years later in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989), the Supreme Court again considered the constitutionality of religious displays located on public property. One was a creche placed on the Grand Staircase inside a county courthouse in downtown Pittsburgh. The creche was surrounded on three sides by a wooden fence, decorated with poinsettias and a sign proclaiming "Glory to God in the Highest!" The other was a menorah displayed in front of the courthouse. The menorah stood next to a Christmas tree and a sign rested below the tree with the words "Salute to Liberty."

The Court in *Allegheny* held that the creche display violated the Establishment Clause because "nothing in the content of the display detracts from the creche's religious message," as it "stands alone; it is the single element of the display on the Grand Staircase," which was "the 'main' and 'most beautiful part' of the building." *Id.* at 598-99. The Court concluded that based on this location, "no viewer could reasonably think that it occupies this location without the support and approval of the government." *Id.* at 599-600. On the other hand, the Supreme Court held that the menorah display was constitutional. As Justice Blackmun explained, the menorah stood next to a Christmas tree and a sign saluting liberty, and thus created an "overall holiday setting" which neutralized the religious dimensions of the menorah. *Id.* at 614 (Blackman, J., concurring).

Together *Lynch* and *Allegheny* provide significant guidance for our fact-specific analysis of the second prong of *Lemon*. In those cases, the Supreme Court upheld the constitutionality of government displays of purely religious symbols — a creche and a menorah — when those symbols were part of a larger display. But where the religious display — the creche in *Allegheny* — stood alone, it violated the Establishment Clause. Here, the Ten Commandments monument stands not alone, but as part of Elkhart's larger cultural and historical outdoor display. As the court points out, in addition to the Ten Commandments monument, the small, twenty-five-foot-wide courtyard includes a bas-relief of an elk's head with the words "DEDICATVM" and "JVSTITIAM" inscribed next to this

symbol of "Elk"hart; a Revolutionary War Monument surrounded by a flower bed and bearing a plaque explaining that the Daughters of the American Revolution donated the monument in honor of the Revolutionary War soldiers buried in Elkhart County; and the Freedom Monument, which consists of a light standing on top of a brick pillar which reads "BEHOLD FRIEND, YOU ARE NOW ON HALLOWED GROUND FOR HERE BURNS FREEDOM'S HOLY LIGHT."[13]

These other displays place the Ten Commandments monument in an historical context, and under *Lynch* and *Allegheny* context is everything. Thus, in *Lynch*, the Court held that a solely religious symbol — a creche — was constitutionally permissible because "when viewed in the proper context," the creche "depicts the historical origins of the traditional event long recognized as a National Holiday." *Lynch*, 465 U.S. at 680. Similarly, when viewed in the context of the other monuments displayed outside Elkhart's municipal building, the Ten Commandments monument "depicts the historical origins" of the United States' justice system. Moreover, while the creche is solely a religious symbol, the text of the Ten Commandments itself provides context to the monument, as the monument includes not just religious commands, but six rules of conduct that have meaning in the secular world. The presence of both secular and religious messages in the Ten Commandments monument makes this a stronger case than the creche at issue in *Lynch*.

[13] The court is concerned that this monument could have a religious meaning to someone approaching the building because it uses the words "hallowed" and "holy." Opinion at 26-27. Considering the words in the context of the display and its location, however, demonstrates that there is nothing religious about the display. Rather, the ground is "hallowed" because freedom's "holy light" burns "here," and "here" is the municipal building where justice is served through the county government. The choice of the words "hallowed" and "holy" merely serve as a literary device to honor freedom; the words in context do not have a religious meaning. See *Webster's Seventh New Collegiate Dictionary* (G. & C. Merriam Co. 1972), offering alternative definitions for "hallow" — one religious, "to make holy," and one secular, "to respect greatly."

True, there were many more holiday displays present in *Lynch* than are located in the 25-foot-wide courtyard at issue here, but Elkhart's display still includes more than the total of three involved in *Allegheny*. In *Allegheny*, in addition to the menorah, there stood only a Christmas tree and a sign stating "Salute to Liberty." Compared to *Allegheny's* constitutional "salute to liberty" display, Elkhart's cultural and historical display more fully neutralizes the religious dimension of the Ten Commandments. In short, if the menorah was constitutional in *Allegheny*, the Ten Commandments display must be in this case. *See, e.g., Freedom From Religion Foundation*, 898 P.2d 1013 (holding that Ten Commandments monument on Colorado State Capitol Complex was constitutional); *Anderson*, 475 F.2d at 33 (upholding Ten Commandments monument displayed on the lawn of a courthouse because it had "substantial secular attributes");[14] *Suhre*, 55 F. Supp. 2d 384 (holding display of Ten Commandments in county courtroom did not violate the Establishment Clause). In its discussion of *Lynch* and *Allegheny*, the court does not distinguish these Supreme Court opinions when it concludes that the Ten Commandments monument constitutes an establishment of religion. Rather, the court focuses on the question of whether "an objective observer familiar with the history and placement of the Ten Commandments monument would perceive it as a state endorsement of religion." Opinion at 26. This is the appropriate question, but for the answer we must consider comparable facts underlying the Supreme Court's cases involving the Establishment Clause. That precedent leads to the conclusion that a monument of the Ten Commandments is constitutional when part of a larger historical and cultural display. That is what we have in this case.[15]

[14] While *Anderson* was decided before *Stone v. Graham*, 449 U.S. 39, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980) (per curiam), *Stone* is distinguishable because it involved the posting of the Ten Commandments in the school setting. *See infra* at 54-56. In fact, the five-Justice majority in *Stone* did not even cite to *Anderson* — the only circuit decision considering and approving the constitutionality of a Ten Commandments monument.

[15] Although the court insists "the monument certainly cannot

This circuit's decisions in *American Jewish Congress*, 827 F.2d 120, and *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991), do not alter the analysis. *Harris* applied *Lemon* to a challenge to a religious symbol contained in two different city seals. It is not helpful because it involved two consolidated cases challenging the official seals of two cities in Illinois. Here the government's display of a monument which served as only one aspect of a larger historical display has minimal similarity to an official seal emblazoned on stationery, signs, and numerous other official standards. *American Jewish Congress* is more closely related as it involved the constitutionality of a government-displayed creche. But even the facts in *American Jewish Congress* differ significantly from those involved in this case. In *American Jewish Congress,* the creche display, which this court held violated the Establishment Clause, stood in isolation in the center of the City-County building in Chicago. It was the creche's visual isolation from the other holiday displays and its place of honor that caused this court to hold that a reasonable observer of the creche would believe that Chicago was endorsing Christianity. *See American Jewish Congress*, 827 F.2d 120.

Conversely, in this case, the Ten Commandments

be fairly characterized as a component of a comprehensive display of the cultural heritage of the people of Elkhart," the facts point to the opposite conclusion. Within the very small 25-foot-wide courtyard rest four historical displays, including a monument to freedom, the Revolutionary War monument, the Ten Commandments monument, and the Elk bas-relief. These displays represent various aspects of our country and Elkhart's history, and encompass themes relevant to the offices located inside the Municipal Building, including not just the city court, but also the mayor's office, the human relations department, and the offices of the Common Council. Given the limited space available, it is impossible to get much more "comprehensive" than the current display. A more compact layout could lose what Elkhart strived to create — an aesthetically pleasing visual display, centered by the Elk bas-relief and balanced by the other monuments that flank the walkway. Nor does a display have to be "comprehensive" to dilute the religious aspect of one exhibit, as is clear from the Supreme Court's decisions in *Lynch* and *Allegheny* — displays which were far from comprehensive.

monument sits with other monuments on the lawn of the Municipal Building, as opposed to being prominently displayed alone in the center of day-to-day county business. The Ten Commandments monument is also not visually isolated, but rests on one side of the walkway, while *two* other monuments — the Freedom Monument and the Revolutionary War monument — decorate the opposite side. These monuments are equally distant from both the entrance to the Municipal Building and the sidewalk. Opinion at 5 n.3. And a fourth monument of sorts — the Elk bas-relief — adorns the visual center of the walkway, hanging over the building's entranceway. Thus, compared to the creche at issue in *American Jewish Congress,* the Ten Commandments monument is not given special placement by the City. Rather, the Ten Commandments monument is one of multiple monuments closely placed in the available, yet small, walkway leading into the municipal building.[16]

The court also opines that "The format of the monument itself hardly dilutes its religious message. Indeed, this monument impermissibly suggests that, in this community, there are 'ins' and 'outs.'" Opinion at 27. This reasoning is misplaced for two reasons. First, the inclusion of Jewish, Catholic, and Protestant symbols actually makes the monument more likely to pass constitutional muster. *See Freedom From Religion Foundation*, 898 P.2d at 1024 ("The juxtaposition of the Christian Chi and Rho with the Jewish Star of David reflect an acknowledgment of reconciliation and diversity more than any sentiment of intolerance . . . [and] the 'eternal eye' contains the pyramid, which is a symbol from Egypt itself, indicating that 'it has a different genesis than the three religions that use the Ten Commandments.'"). *See also, Allegheny*, 492 U.S. at 620 (Blackman, J., concurring) ("The Christmas tree

[16] In fact, the differences between the monument at issue in this case and the display challenged in *American Jewish Congress* are very similar to the differences the Supreme Court faced in *Allegheny:* the creche, which was unconstitutionally favored by its prominent and solitary placement inside the county courthouse, and the menorah, which was constitutionally located outside the courthouse near a Christmas tree and a sign saluting liberty. As noted, the location proved dispositive in *Allegheny.*

alone in the Pittsburgh location does not endorse Christian belief; and on the facts before us, the addition of the menorah 'cannot fairly be understood to' result in the simultaneous endorsement of Christian and Jewish faiths."); *id.* 492 U.S. at 635 (O'Connor, J., concurring) (the display of a menorah and a secular symbol of the Christmas holiday "did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief. . . ."). Second, implicit in the court's reasoning is the belief that a display must include everyone's religious symbol to avoid constitutional infirmity. We know from *Allegheny* and *Lynch* that such is not the case; in *Lynch,* there was only one religious symbol — that of Christians, a creche — and in *Allegheny* there was only one religious symbol — that of Jews, a menorah. Yet, the Supreme Court upheld those religious displays because any perceived endorsement of religion was diluted by the secular symbols also displayed — not because a religious symbol representing every citizen's beliefs was incorporated in the display. Clearly if any display had to include all potential "ins," all displays would be "out."

The court also believes that the placement of an American Eagle gripping the flag at the top of the monument furthers the impression that Elkhart is endorsing religion. Opinion at 27. On the contrary, like the "Salute to Liberty" sign placed by the menorah and Christmas tree in *Allegheny,* here the presence of the American Eagle, our flag and the All-Seeing Eye help place the monument in context for the viewers by reminding passers-by that the Ten Commandments served an important role in our country's legal foundation. *See, e.g., Allegheny,* 492 U.S. at 619 ("The [Salute to Liberty] sign further diminishes the possibility that the tree and the menorah will be interpreted as a dual endorsement of Christianity and Judaism. The sign states that during the holiday season the city salutes liberty."). Coupled with the six clearly secular commands, the flag, eagle and all-seeing eye broadcast a secular message of justice and patriotism, as does the inscription that the monument was presented to the City by the Fraternal Order of Eagles — a secular organization dedicated to promoting "Liberty, Truth, Justice, and Equality." But in any event, even to the extent that the placement of American symbols on the Ten Commandments monument

does not dilute the religious message contained in the first six commands,[17] it is important to note that the religious aspect of the Ten Commandments need not be minimized; rather it is a message of possible endorsement that must be sufficiently minimized by its setting and context. *See Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) ("[A] typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content."). Thus, the overall context of a display must overcome any message of endorsement, and in this case when the Ten Commandments monument is viewed in its park-like setting with the other three artists' secular renderings, any possible view of religious endorsement is sufficiently diluted to withstand constitutional scrutiny.

One final point: It is important to note that while the two plaintiffs involved in this case took offense to the Ten Commandments monument, that is not dispositive because the question is whether an "objective" observer would believe that the display constituted an endorsement of religion. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 120 S. Ct. 2266, 2278, 147 L. Ed. 2d 295 (2000). The fact that the plaintiffs — and for that matter many citizens — wrongly believe that the Constitution requires a separation of Church and State, or ardently wish that were the case, does not alter the test. *Lynch,* 465 U.S. at 673 ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."). Rather, the appropriate question is whether a citizen knowing the totality of the facts and the circumstances would believe that Elkhart seeks to endorse religion. *See Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 780, 132 L. Ed. 2d 650, 115 S. Ct. 2440 (1995) (O'Connor, J., concurring) ("The reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in

[17] The text of the Ten Commandments monument listed twelve commands so as to serve as an amalgamation of the Jewish, Protestant and Catholic versions of the Ten Commandments. The first six commands refer to God or the Sabbath, while the last six do not. Opinion at 6.

which the religious display appears."). *See also, Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) (same). An informed citizen would know that the Ten Commandments monument was donated in the 1950's — and also know the historical context of those times: that the Eagles who donated the monument were not a religious group; that the original purpose was to recognize general codes of conduct and that the Ten Commandments is an historical example of such a code; and that today Elkhart leaves standing the monument out of recognition for that history and in commemoration of the legal roots of our country.[18]

As the plaintiffs' own testimony demonstrates, they are not reasonably informed citizens, but are demonstrating an outright hostility to religion, even in private, non-governmental settings. *See*, Books Deposition (stating that he is offended by any reference by a private organization to God); Suetkamp Deposition (stating that he is offended when the Pledge of Allegiance is said in a private setting). *See, e.g., Suhre*, 55 F. Supp. 2d at 398 ("In fact, the Plaintiff's angst results more from his own intolerance of the rights of others than a desire to protect his own atheistic convictions."); *Gaylor*, 74 F.3d at 217 (the reasonable observer inquiry is "not about the perceptions of particular individuals or saving isolated non-adherents from the discomfort of viewing symbols of faith to which they do not subscribe") (internal quotation omitted). Based on these facts, a reasonable person would not believe that Elkhart is endorsing religion (which perhaps explains why, other than these two plaintiffs, no one complained to Elkhart about the Ten Commandments monument during the forty years it stood outside the Municipal Building). For these reasons, I conclude that the City's decision to leave standing the monument satisfies *Lemon's* second prong.

B. *Stone v. Graham*

[18] In this last regard, the Common Council's resolution not only explains its secular purpose, but also serves to inform the citizenry that Elkhart has no desire to endorse religion--it is merely acknowledging religion's role in our country's history. Or in the court's language, Elkhart in passing the resolution has "taken steps to 'obviate its religious purpose.'" Opinion at 20 n.8.

The court also relies on *Stone v. Graham*, 449 U.S. 39, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980) (per curiam), to support its conclusion that Elkhart's decision to leave standing the Ten Commandments monument constitutes an unconstitutional establishment of religion. In *Stone*, the Supreme Court (without argument and in a 5-4 per curiam decision) held that a Kentucky statute which required the posting of the Ten Commandments on schoolroom walls was unconstitutional. In concluding that Elkhart had an impermissible religious purpose when it decided to leave in place the Ten Commandments monument, the court relies on the Supreme Court's statement in Stone that the Ten Commandments transcends "arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. Rather, the first part of the Commandments concerns the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day." *Id.* at 41-42. Without doubt that is true. But, as the court also recognizes, the display of a religious symbol may still have a secular purpose. Opinion at 19. This point is extremely important when one remembers that *Stone* was decided prior to *Lynch* and *Allegheny* — cases in which displays of purely religious symbols (as opposed to the Ten Commandments which contains both religious and secular rules) were upheld because of other secular justifications. This is significant because in *Stone* the Ten Commandments were posted alone on school walls, while in this case the Ten Commandments monument is part of a larger historic display with a secular message. In fact, the Supreme Court in rejecting the posting of the Ten Commandments noted that they were to be displayed in isolation, as opposed to incorporated into "the study of history, civilization, ethics, comparative religion, or the like." *Stone*, 449 U.S. at 42. That factor distinguishes *Stone* from the Ten Commandments monument involved in this case, and makes this case more analogous to *Lynch* and *Allegheny*.

Stone is distinguishable for another and more fundamental reason — it involved the mandated posting of Ten Commandments in schools. Where impressionable youths are involved the Supreme Court has taken a harsher view of religion. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 592, 120 L.

Ed. 2d 467, 112 S. Ct. 2649 (1992) ("There are heightened concerns with protecting freedom of conscience from subtle coercive pressure in schools."); *Edwards v. Aguillard*, 482 U.S. 578, 583-84, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987) ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."); *Abington v. Schempp*, 374 U.S. 203, 307, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) (Goldberg, J., concurring) ("The pervasive religiosity and direct governmental involvement inhering in the prescription of prayer and Bible reading in the public schools, during and as part of the curricular day, involving young impressionable children whose school attendance is statutorily compelled, and utilizing the prestige, power, and influence of school administration, staff, and authority, cannot realistically be termed simply accommodation, and must fall within the interdiction of the First Amendment."); *Board of Ed. of Westside Community Schools v. Mergens*, 496 U.S. 226, 261-62, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (Kennedy, J., concurring) ("The inquiry with respect to coercion must be whether the government imposes pressure upon a student to participate in a religious activity. This inquiry, of course, must be undertaken with sensitivity to the special circumstances that exist in a secondary school where the line between voluntary and coerced participation may be difficult to draw."). Thus, while the Supreme Court has upheld the opening of legislative sessions with prayer, *Marsh v. Chambers*, 463 U.S. 783, 786, 77 L. Ed. 2d 1019, 103 S. Ct. 3330 (1983), it has declared unconstitutional the opening of school sessions with prayer. *Engel v. Vitale*, 370 U.S. 421, 8 L. Ed. 2d 601, 82 S. Ct. 1261 (1962). Likewise, whereas the Supreme Court upheld the constitutionality of the creche and menorah displays in *Lynch* and *Allegheny*, the Court also noted that it would have a different case if the displays arose in the school setting. *See, e.g., Allegheny*, 492 U.S. at 620 n.69 ("This is not to say that the combined display of a Christmas tree and a menorah is constitutional wherever it may be located on government property. For example, when located in a public school, such a display might raise additional constitutional considerations. *Cf. Edwards v. Aguillard*, 482 U.S. at 583-584, 107 S. Ct. at 2577 (Establishment Clause must be applied with special sensitivity in the public-school context)."). Again, context is

critical, and the school context in Stone dictated the result, as demonstrated by the Court's reliance on school prayer cases. *See Stone*, 449 U.S. at 42, citing *Abington School District*, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844, and *Engel*, 370 U.S. 421, 8 L. Ed. 2d 601, 82 S. Ct. 1261. Therefore, while *Stone* speaks for the school setting — where student attendance is compulsory, and pupils are particularly susceptible to influence — it does not answer the question in the context of an open courtyard where citizens may divert their eyes, if confronted by a discomforting reference to God, to one of the other secular monuments forming the larger historical display. *See, e.g., Freedom From Religion Foundation*, 898 P.2d at 1022-23 (distinguishing *Stone* based on the school setting, and upholding the constitutionality of a Ten Commandments monument on state capital grounds).

C. Historical Practices

Given the factual similarities to the displays constitutionally permitted in *Lynch* and *Allegheny*, Elkhart's decision to leave the Ten Commandments monument standing should not violate the *Lemon* test. But even if the *Lemon* test was not met, where a religious symbol has meaning in history and ubiquity, the Supreme Court has side-stepped the strictures of *Lemon* because the results would be contrary to the clear intent of the Framers of the Constitution. For instance, in *Marsh v. Chambers*, 463 U.S. 783, 77 L. Ed. 2d 1019, 103 S. Ct. 3330 (1983), the Court upheld the practice of Congress opening the legislative session with prayer stating:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.

Id. at 792.

Significantly, *Marsh* did not apply *Lemon*, but in its holding recognized the fact that "there is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674. In fact, that history predates our three branches of government, beginning with the proclamation in our Declaration of Independence that all men "are endowed by their Creator with certain unalienable Rights," and continues even as recently as the President's call to Americans to "thank God today for the lives, the character, and courage of the crew of the USS Cole."

The Supreme Court has long recognized the constitutionality of such religious references. For instance, the Court has acknowledged that its own court proceedings open with an announcement which concludes "God save the United States and this Honorable Court." *Marsh*, 463 U.S. at 786. The Court has also noted that the Establishment Clause does not prohibit "prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a national holiday; 'so help me God' in our courtroom oaths — these and all other references to the Almighty that run through our laws, [and] our public rituals . . . [including] the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'" *Zorach v. Clauson*, 343 U.S. 306, 312-13, 96 L. Ed. 954, 72 S. Ct. 679 (1952). Likewise in *Lynch v. Donnelly*, 465 U.S. at 674-75, Justice O'Connor noted that "our history is replete with official references to the value and invocation of Divine guidance," and includes "government practices embracing religion, including Thanksgiving and Christmas holidays, congressional and military chaplains and the congressional prayer room, the motto, the Pledge of Allegiance, and presidential proclamations for a National Day of Prayer," thus implicitly acknowledging the constitutionality of such practices. As Justice O'Connor explained, "Because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs." *Id.* at 693.

Also informative are comments the Supreme Court has made concerning the constitutionality of the 1932 artistic rendition of Moses and the Ten Commandments contained in

the frieze surrounding the walls of the highest court. For instance in *Lynch*, 465 U.S. at 676, in considering an Establishment Clause challenge the Court noted that "the very chamber in which oral arguments on this case were heard is decorated with a notable and permanent — not seasonal — symbol of religion: Moses with the Ten Commandments." *See also Allegheny*, 492 U.S. at 652-53 (Stevens, J., concurring in part, dissenting in part) (noting that it "would be absurd to exclude" the inclusion of Moses, Confucius and Mohammed from the Supreme Court's frieze because they are religious lawgivers). More recently, Chief Justice Rehnquist justified the presence of Muhammad in the north wall frieze in the Courtroom, stating "'the depiction of Muhammad was intended only to recognize him, among many other lawgivers, as an important figure in the history of law; . . . It is part of an architectural and aesthetic unit that has been in place more than sixty years.'"). *Suhre*, 55 F. Supp. 2d at 394 (quoting from a 1997 statement of Chief Justice Rehnquist).

The circuit courts have also accepted historical references to the Deity, upholding our national motto of "In God We Trust," and the same inscription on our currency, *O'Hair v. Murray*, 588 F.2d 1144 (5th Cir. 1979) (upholding national motto "In God We Trust"); *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970) (accord), as well as the constitutionality of the Pledge of Allegiance's reference to God. *Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Township*, 980 F.2d 437 (7th Cir. 1992).

The reference to God on the Ten Commandments monument is much like these other references — an acknowledgment of our religious roots. While the display does not date back to our nation's founding, neither does the Pledge of Alliance's reference to God, or other such constitutionally approved religious references, such as the "In God We Trust" motto and inscription. Rather, many of the Deity references find their roots in our more recent history — the 1950's — just as the Ten Commandments monument in this case does. Therefore, in looking at the monument that still stands before Elkhart's Municipal Building, it is helpful to view it in light of the time it was placed there.

In the 50's the Cold War was daunting, and our country

— as it often does in times of crisis — acknowledged the importance of God. *See* 100 Cong. Rec. 1700 (1954) ("The fundamental issue which is the unbridgeable gap between America and Communist Russia is a belief in Almighty God.") (statement of Rep. Rabaut). In 1952, Congress established the "National Day of Prayer," H.R.J. Res. 382, 82d Cong., 2d Sess. (1952), recognizing that "the national interest would be much better served if we turn aside for a full day to pray for spiritual help and guidance from the Almighty during these turbulent times." 98 Cong. Rec. 771 (1952) (statement of Rep. Brooks). That same year, Justice Douglas, writing for the Supreme Court in *Zorach v. Clauson*, 343 U.S. 306, 313, 96 L. Ed. 954, 72 S. Ct. 679 (1952), penned the now-famous line: "we are a religious people whose institutions presuppose a Supreme Being." The following year, in 1953, the House of Representatives voted to establish a prayer room in the Capitol. H.R. Cong. Res. 60, 83d Cong., 99 Cong., 99 Cong. Rec. 9073 (1953). The Bill's sponsor explained that the legislation's purpose was to "provide a place of retreat as an encouragement to prayer. . . ." 99 Cong. Rec. 9073 (1953) (statement of Rep. Hays). Congressman Scrivner went further, explaining that "at this time in the world's history, when the materialistic ideology of the Communists is . . . right in our own land, it is comforting to know that the Congress of the United States goes on record as believing in the spiritual values taught by all religions, and also showing to the world their belief in prayer and meditation as opposed to the barbarous teachings that so many nations have fallen prey to." 99 Cong. Rec. 9075 (1953) (statement of Rep. Scrivner).

In 1954, Congress added the phrase "one Nation under God" to the Pledge of Allegiance. This amendment came in response to a sermon delivered by the Reverend George M. Docherty at the New York Avenue Presbyterian Church in Washington D.C. at a service which President Eisenhower and several Senators and Representatives had attended. In his sermon, Reverend Docherty noted that our Pledge of Allegiance was missing something — something that would distinguish it from the pledge "little Muscovites might repeat" in a "pledge to their hammer-and-sickle flag in Moscow." Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2118-19 (1996).

That something was a recognition of God. After the President signed this legislation, the new Pledge of Allegiance was recited and a bugler played a rendition of "Onward, Christian Soldiers." 100 Cong. Rec. 6348 (1954) (statement of Sen. Ferguson).

The trend continued: In 1955 Congress mandated the inscription of "In God We Trust" on all coins and paper currency. The bill's sponsor, Representative Bennett, spoke on the bill's passage: "In these days when imperialistic and materialistic communism seeks to attack and to destroy freedom, it is proper for us to seek continuously for ways to strengthen the foundation of our freedom. At the base of our freedom is our faith in God and the desire of Americans to live by His will and His guidance. As long as this country trusts in God, it will prevail. To remind all of us of this self-evident truth, it is proper that our currency should carry these inspiring words, coming down to us through our history: 'In God We Trust.'" 101 Cong. Rec. 4384 (1955) (statement of Rep. Bennett). The following year, Congress codified "In God We Trust" as our national motto. See Act of July 31, 1956, Pub. L. No. 84-851 (codified at 36 U.S.C. § 186 (1994)). Two years later, in 1958, as part of its national project, the Elkhart Eagles chapter donated the Ten Commandments monument to the City of Elkhart.

As a nation, we are thankful the Communist wall of separation has fallen. And it is true that following the Supreme Court's Establishment Clause jurisprudence beginning in the 60's, our governments are increasingly restricted in invoking the name of God. We have numbed such invocations with terms such as "rote repetition," moments of silence, and "ceremonial deism." Yet that does not change the historical fact that the Ten Commandments served as the foundation for our country's legal system. A monument displaying the Decalogue acknowledges that fact without endorsing it. The Ten Commandments monument also serves as an historical headstone, not only for our nation's original foundation, but also for the 1950's, a religious time in America when as a nation we turned to God. A time when divorce, illegitimacy, drug abuse, murder, abortion, youth violence, and the other crises of today were still relatively rare.

In sum, I believe the retention of the 40-year-old Ten Commandments monument displayed outside Elkhart's Municipal Building is justified based on our country's early and more recent history as a "tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh,* 463 U.S. at 783. Because of the Ten Commandments' history and ubiquity, it should be treated just as other accepted practices, such as the Supreme Court's frieze, the national Thanksgiving and Christmas holidays, congressional and military chaplains and the congressional prayer room, the national motto, the Pledge of Allegiance, presidential proclamations for a National Day of Prayer, and our own court's opening "God save the United States and this Honorable Court." Therefore, even if the Ten Commandments monument would fail the strictures of the *Lemon* test (which, in my view, it does not), I believe Elkhart may constitutionally leave it standing.

D. Remedy

Because I believe that Elkhart's decision to leave the Ten Commandments monument standing does not constitute an "establishment of religion," I would conclude that the monument's placement and design is fine as is. However, the court concludes otherwise, and thus is correctly concerned about the appropriate remedy. While I have no doubt that the City can locate an obscure hiding place for the monument, that should not be necessary. Cemeteries are full of monuments honoring times past. But this monument should not be exiled to the equivalent of a graveyard. Perhaps it could remain in place if it could be sufficiently diluted with additional plaques and memorials. I don't think anyone would accept some sort of redaction whereby the preliminary references to God would be chiseled away or otherwise defaced. There must be some other way to minimize any perception of endorsement, and many communities and the State of Indiana seek guidance on where and how the Decalogue can be prominently displayed without offending the Constitution. Yet, if the court's decision in this case stands, there may be no remedy other than removal because the court concludes that the City lacked a secular purpose justifying its decision to leave undisturbed the Ten Commandments monument. Thus, it appears that under the court's reasoning, no matter what Elkhart does to dilute the

religious aspects of the Ten Commandments, the monument will still be unconstitutional because its fails *Lemon's* first prong by not having a secular purpose. And if Elkhart cannot prove that it has a legitimate secular purpose by passing a resolution forty years after the monument was donated, there doesn't seem to be much else it could do to prove that it has sanitized any religious motive that has since become unconstitutional.

II.

To this point, I have examined most of the tests and distinctions set in place by the Supreme Court. While I am confident this analysis under *Lemon* is correct, I also recognize that reasonable people can disagree. *See Lemon*, 403 U.S. at 612 ("Candor compels acknowledgment . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."). This variance of opinion is inevitable when one considers what *Lemon* requires: We look to the number of displays, their placement, their height, width, and distance from other displays ("scrutiny more commonly associated with interior decorators than with the judiciary"). *American Jewish Congress*, 827 F.2d at 129 (Easterbrook, J., dissenting). We question whether the symbol is religious, was religious, could be religious, or is both religious and secular. We try to look behind the words of legislators and Common Council members to measure their intent — history? God? Some of each? Some frustrated Justices have been led to discuss the absurdity of the *Lemon* test. *See Lee v. Weisman*, 505 U.S. 577, 644, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992) (Scalia, J., dissenting) (stating that Lemon "has received well-earned criticism from many Members of this Court," and collecting opinions criticizing *Lemon). See also, Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398-99, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993) (Scalia, J., concurring in judgment) (collecting opinions criticizing *Lemon).* But in the end there has to be a *Lemon* test, or some other test now that the Court has departed from the text and original understanding of the Establishment Clause.

The Establishment Clause reads that "Congress shall make no law respecting an establishment of religion." "The Framers intended the Establishment Clause to prohibit the designation

of any church as a 'national' one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others." *Wallace v. Jaffree*, 472 U.S. 38, 113, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985) (Rehnquist, J., dissenting). The Establishment Clause further sought "to protect *state establishments* of religion from federal interference." *Lee*, 505 U.S. at 641 (Scalia, J., dissenting) (emphasis added). *See also, American Jewish Congress*, 827 F.2d at 129 (Easterbrook, J., dissenting) ("The Establishment Clause was supposed to prevent the federal government from taxing for the support of a church or requiring religious observance."). What the Establishment Clause did not intend to do was to build a wall of separation, or to mandate that the government treat religion and irreligion equally. *See, e.g., Wallace*, 472 U.S. 38, 98, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (Rehnquist, J., dissenting) (Madison "did not see it as requiring neutrality on the part of government between religion and irreligion."). *See generally, Wallace*, 472 U.S. at 91-114 (Rehnquist, J., dissenting); *Lee*, 505 U.S. at 631-46 (Scalia, J., dissenting); *American Jewish Congress*, 827 F.2d at 128-40 (Easterbrook, J., dissenting); Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (1986).

History proves that, and "the true meaning of the Establishment Clause can only be seen in its history." *Wallace*, 472 U.S. at 113 (Rehnquist, J., dissenting). See also, *Lee v. Weisman*, 505 U.S. at 632 (Scalia, J., dissenting) ("Justice Holmes' aphorism that 'a page of history is worth a volume of logic' applies with particular force to our Establishment Clause jurisprudence.") (internal citation omitted). History shows that "from our Nation's origin, prayer has been a prominent part of governmental ceremonies and proclamations. The Declaration of Independence, the document marking our birth as a separate people, 'appealed to the Supreme Judge of the world for the rectitude of our intentions' and avowed 'a firm reliance on the protection of divine Providence.'" *Id.* at 633. In fact, George Washington, in his first inaugural address, "after swearing his oath of office on a Bible, . . . deliberately made a prayer a part of his first official act as President." *Id.* And when Congress passed the first ten amendments to the Constitution, "George Washington himself, at the request of

the very Congress which passed the Bill of Rights, proclaimed a day of 'public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God.'" *Id.* at 635. As Justice Rehnquist succinctly summarized: "History must judge whether it was the Father of his Country in 1789, or a majority of the Court which has strayed from the meaning of the Establishment Clause." *Wallace*, 472 U.S. at 113 (Rehnquist, J., dissenting).

The Lemon "three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service." *Id.* at 110. Lemon's view of the Establishment Clause "is demonstrably incorrect as a matter of history. And its repetition in varying forms in succeeding opinions of the Court can give it no more authority than it possesses as a matter of fact; stare decisis may bind courts as to matters of law, but it cannot bind them as to matters of history." *Id.*

For now, however, the history as viewed by these dissenting jurists has been displaced by the Lemon test. Until the Court returns to the original understanding of the Establishment Clause we are bound by Lemon, and we therefore are left to measure the dilution of the religious message and question the sincerity of the government's secular motive--neither task well suited to the judiciary. Nonetheless, even under these complicated standards, the Ten Commandments monument does not constitute an establishment of religion.

III.

The Ten Commandments monument serves several secular purposes, including a recognition of our country's legal, historical, and yes, religious roots. Any perceived endorsement of religion is diluted by Elkhart's incorporation of secular symbols on the monument — placing the Ten Commandments in context of this country's history — and by the existence of other secular monuments in Elkhart's municipal building parkway. Moreover, even if we were to conclude that the monument fails the strictures of the Lemon test, I believe that history and ubiquity justify Elkhart's decision to leave undisturbed a monument which has rested unobtrusively and undisturbed in front of its municipal building for more than

forty years in recognition of our country's religious and legal roots. I therefore DISSENT from the court's holding that Elkhart's decision to leave in place the Ten Commandments monument constitutes an establishment of religion, and its implicit mandate that it must be removed.

APPENDIX B
No. 00-1114

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM A. BOOKS and MICHAEL SUETKAMP,

Plaintiffs-Appellants,

v.

CITY OF ELKHART, INDIANA,

Defendant-Appellee.

MOTION TO RECALL AND STAY THE MANDATE
JANUARY 31, 2001

RIPPLE, *Circuit Judge* (in chambers).

This matter is before me on the application of the City of Elkhart, Indiana, for a stay of this court's mandate while the City seeks a writ of certiorari in the Supreme Court of the United States. When this application was first presented to me, I ordered that the plaintiffs file a response. That response has been received, and the matter is now before me for disposition.

Familiarity with our decision in *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), is presumed; I shall set forth only a thumbnail sketch of the underlying litigation. The plaintiffs, William Books and Michael Suetkamp, residents of Elkhart, brought this action because they objected to the placement of a monument inscribed with the Ten Commandments on the lawn of Elkhart's Municipal Building. The district court granted summary judgment in favor of the City. On December 13, 2000, this court reversed that decision. We held that, under the facts established in this record, the primary purpose and effect of the monument is to advance or endorse religion; therefore, the display violates the Establishment Clause of the First Amendment to the Constitution of the United States. We then remanded the case

with instructions that the district court fashion a remedy that, while correcting the condition that offends the Constitution, otherwise does not intrude on the authority of local government to decide on the placement of the monument. We noted that arriving at a realistic solution would take some time and expressed confidence that the district court would ensure that Elkhart authorities had a reasonable time to address in a reasonable and prudent manner the task of conforming to the letter and the spirit of the constitutional requirement.

1.

When a party asks this court to stay its mandate pending the filing of a petition for a writ of certiorari, that party must show that the petition will present a substantial question and that there is good cause for a stay. *See* Fed. R. App. P. 41(d)(2)(A). The grant of a motion to stay the mandate "is far from a foregone conclusion." 16A Charles Alan Wright et al., Federal Practice and Procedure § 3987.1 (3d ed. 1999). Instead, the inquiry must focus on whether the applicant has a reasonable probability of succeeding on the merits and whether the applicant will suffer irreparable injury. *See Williams v. Chrans*, 50 F.3d 1358, 1360 (7th Cir. 1995) (per curiam); *United States v. Holland*, 1 F.3d 454, 456 (7th Cir. 1993) (Ripple, J., in chambers).

2.

To demonstrate a reasonable chance of succeeding on the merits, the applicant must show a reasonable probability that four Justices will vote to grant certiorari and a reasonable possibility that five Justices will vote to reverse the judgment of this court. *See Williams*, 50 F.3d at 1360; *Holland*, 1 F.3d at 456. In undertaking this assessment, I must consider the issues that the applicant plans to raise in the certiorari petition in the context of the case history, the Supreme Court's treatment of other cases presenting similar issues, and the considerations that guide the Supreme Court in determining whether to issue a writ of certiorari. *See Williams*, 50 F.3d at 1361. This assessment requires that I undertake a somewhat different task than that performed by a circuit judge in deciding a case on the merits. The Supreme Court has made it clear that, in deciding cases presented in the normal course of decision, a

lower court judge ought not anticipate changes in established doctrine. *See State Oil Co. v. Khan*, 522 U.S. 3, 20, 139 L. Ed. 2d 199, 118 S. Ct. 275 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989). On the other hand, in determining whether to grant an application for stay of mandate, the judge must perform the predicative function of anticipating the course of decision in the Supreme Court of the United States. *See INS v. Legalization Assistance Project*, 510 U.S. 1301, 1304, 126 L. Ed. 2d 410, 114 S. Ct. 422 (1993) (O'Connor, J., in chambers).

Even taking into account this different perspective, I cannot say that the City has made a strong case that further review by the Supreme Court is warranted or that the Supreme Court will ultimately reach a decision different from the one reached in this court. The City asserts that this court's decision is in direct conflict with the Tenth Circuit's decision in *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.), *cert. denied*, 414 U.S. 879, 38 L. Ed. 2d 124, 94 S. Ct. 50 (1973), and the Colorado Supreme Court's decision in *Colorado v. Freedom from Religion Foundation, Inc.*, 898 P.2d 1013 (Colo. 1995), *cert. denied*, 516 U.S. 1111, 133 L. Ed. 2d 841, 116 S. Ct. 909 (1996). I cannot accept this contention. The Tenth Circuit recently acknowledged that "since *Anderson* was decided . . . more recent cases, including a Supreme Court case, casts sic doubt on the validity of our conclusion that the Ten Commandments monolith is primarily secular in nature." *Summum v. Callaghan*, 130 F.3d 906, 910 n.2 (10th Cir. 1997). Although the Tenth Circuit decided that it need not revisit the *Anderson* decision in *Summum*, the court noted that the Supreme Court in *Stone v. Graham*, 449 U.S. 39, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980) (per curiam), said that "the Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Summum*, 130 F.3d at 912 n.8. The Supreme Court of Colorado's decision in *Freedom from Religion Foundation, Inc.* involves a placement situation significantly different from the one before us in this case. *See* 898 P.2d at 1015-17.

3.

The other assessment usually undertaken in deciding an application for stay of mandate is whether irreparable injury will take place if the stay is not granted. Here, it is necessary to balance the equities of granting a stay by assessing the harm to each party if a stay is granted. *See California v. American Stores Co.*, 492 U.S. 1301, 1307, 106 L. Ed. 2d 616, 110 S. Ct. 1 (1989) (O'Connor, J., in chambers); *Holtzman v. Schlesinger*, 414 U.S. 1304, 1308-09, 38 L. Ed. 2d 18, 94 S. Ct. 1 (1973) (Marshall, J., in chambers). In this case, both parties agree that a stay ought to be granted. I also must take into consideration the public interest.

In their response to this application, the plaintiffs state that before any steps are taken to remedy the violation, the case "should be finally resolved in all respects." I agree that, given the remedial task before the parties — a task that necessarily will require great wisdom and thoughtfulness by all the parties and their counsel — the public interest is best served by affording the City a full opportunity to seek review in the Supreme Court of the United States before its officials devote attention to formulating and implementing a remedy. Notably, in its opinion, this court specifically recognized that the formulation of a remedy would require significant time and attention. *See Books*, 235 F.3d at 307-08. The court specifically noted that "Elkhart has the right and, indeed, the obligation to take into consideration the religious sensibilities of its people and to accommodate that aspect of its citizens' lives in any way that does not offend the strictures of the Establishment Clause." *Id.* at 307.

4.

Accordingly, although the City presents a weak case for a grant of certiorari, the equities of the situation counsel that the parties not be required to address the merits until the City has been afforded an opportunity to present its contentions to the Justices of the Supreme Court of the United States. The mandate of this court is therefore stayed until the expiration of the time allowed for the filing of a petition for certiorari. If a petition is filed, this stay shall continue until the conclusion of all proceedings before the Supreme Court of the United States.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

WILLIAM A. BOOKS and MICHAEL SUETKAMP,	)	
Plaintiffs,	)	No. 3:98cv0230 AS
v.	)	
CITY OF ELKHART, INDIANA,	)	
Defendant.	)	

(CORRECTED COPY)

I. PROLOGUE

> O yez. O yez. O yez. All persons having business before the honorable, the Supreme Court of the United States are invited to draw near and give their attention for the Court is now sitting. God save the United States and this Honorable Court.[1]

II. MEMORANDUM AND ORDER

In May, 1958, members of the Fraternal Order of the Eagles presented a monument to the City of Elkhart inscribed with, among other things, verses from the book of Exodus in the Old Testament of the Bible commonly called the Ten Commandments. The City accepted the monument and it was placed in an unobtrusive location north of the entrance of

[1] Crier's declaration opening sessions of the Supreme Court of the United States.

City Hall without opposition or complaint. At that time, no one contended that the City's action was unconstitutional. Now, on the basis of what some describe as a "Living Constitution,"[2] that action of nearly half a century is being challenged on constitutional grounds.

This cause is currently before the Court on the parties cross motions for summary judgment, and on Defendant's Motion for Oral Argument dated September 7, 1999. The Plaintiffs, William A. Books and Michael Suetkamp, filed a complaint with this Court May 5, 1998 asking for a declaration that the Defendant City of Elkhart's display of a monument of the Ten Commandments on publicly owned property violates the Establishment Clause of the First Amendment to the United States Constitution. The Plaintiffs also asked that the City be permanently enjoined from placing the Ten Commandments monument on public property.

The Plaintiffs filed a Motion for Summary Judgment on November 12, 1998. On November 13, 1998, the Defendant filed a Motion for Summary Judgment on the grounds that the Plaintiffs lacked standing to bring suit, and that the presence of the Ten Commandments monument does not constitute an endorsement of religion by the City of Elkhart. Both parties filed a number of additional motions which this Court dismissed by order dated September 27, 1999. Defendant's Motion for Oral Argument is also DENIED. The Court has before it a fully developed record with oral arguments before the Magistrate Judge which is adequate for a decision on these motions. Additional oral arguments would only produce unnecessary delay in a proceeding that has already dragged on for a year and a half. The Court has carefully considered all the submissions of the parties and now rules as follows.

III. FACTS

The facts in this case are largely undisputed, however, they are essential to a complete understanding and correct determination of this case. Recent Supreme Court decisions under the Establishment Clause have involved a highly fact

[2] This phrase is commonly associated with Justice Brennan, although it has never been asserted that he actually said it.

sensitive, case by case analysis to determine whether a government practice violates the First Amendment to the Constitution. Therefore, this Court will recount the facts with considerable detail for the record.

A. Background

A large monument containing the text of the Ten Commandments sits outside of the City Municipal Building in Elkhart, Indiana. This monument was given to the City of Elkhart (the "City") in 1958 by the Fraternal Order of Eagles (the "FOE") as part of its National Youth Guidance Program. The Program was initiated by a Minnesota juvenile court judge to address what he discerned to be a need common to many of the youth he encountered in court to have some code of conduct or standards by which to govern their actions. He thought that "they could benefit from exposure to one of mankind's earliest codes of conduct, the Ten Commandments."

The Minnesota judge made clear in his affidavit that his purpose was not to provide religious instruction of any kind, but "to show these youngsters that there were such recognized codes of behavior to guide them." He had the idea of posting a copy of the Ten Commandments in juvenile courtrooms in Minnesota and around the country. To help fund the program, the judge contacted the FOE seeking their support. The FOE is not a religious organization, but rather a service organization dedicated to promoting "Liberty, Truth, Justice, and Equality." Their main mottos are "The Fraternity for the Common Man" and "People Helping Other People."

At first, the idea was rejected by the Eagles because they felt it might be seen as coercive or sectarian. However, after representatives of the Jewish, Protestant, and Catholic faiths worked together to develop a version which "was not identified with any one religious group," the Eagles agreed to support such a youth guidance program.

At this time, the juvenile judge was contacted by motion picture producer Cecille B. DeMille, who was then producing the movie, "The Ten Commandments." Mr. DeMille "thought the program was a wonderful idea," and suggested that something more durable be used for the project like bronze

plaques, which could be distributed around the country. Because "the original Ten Commandments were on granite," the judge suggested, and DeMille agreed, that granite monuments would be more suitable. Local chapters, or "aeries," of the FOE paid for the stone monuments and donated them to their local communities. Elkhart Aerie No. 395 dedicated the monument that is the subject matter of the current litigation to the City of Elkhart pursuant to the purposes of the FOE. Many similar monuments were donated to state and local governments around the country.

B. The Monument

The Ten Commandments monument is made of granite and is approximately six feet high and three and one-half feet wide. It is sculpted in the form of two tablets. At the top of each tablet is a floral design that surrounds the representation of two other tablets. Inside the small tablets are letters identified by the Plaintiffs' expert as an ancient Hebrew script, but for which he offers no translation. Between the two small tablets is an eye within a pyramid - an "all-seeing eye" similar to that depicted on the one-dollar bill. Immediately below this symbol is an American Eagle grasping an American flag.

The largest portion of the monument is taken up with the text that was put together through the collaborative effort mentioned above. It is written in an old English font and reads as follows:

the Ten Commandments
I AM the LORD thy God.
Thou shalt have no other gods before me.
Thou shalt not make to thyself any graven images.
Though shalt not take the name of the Lord thy God in vain.
Remember the Sabbath day, to keep it holy.
Honor thy father and thy mother, that thy days may be long upon the land which thy Lord thy God giveth thee.
Thou shalt not kill.
Thou shalt not commit adultery.
Thou shalt not steal.
Thou shalt not bear false witness against thy neighbor.
Thou shalt not covet thy neighbor's house.

> Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbors.[3]

Below this text, there are two stars of David, symbols associated with the Jewish religion, similar to the star on the Israeli flag. In the center between the two stars of David are two Greek letters, Chi and Rho, one superimposed upon the other. These are the first two letters in the name "Jesus Christ" and this symbol was developed in the early church and is still seen in some Catholic Churches. At the base of the monument, a small scroll appears with these words:

PRESENTED BY
THE CITY OF ELKHART, IND.
BY
ELKHART AERIE NO. 395
FRATERNAL ORDER OF EAGLES
MAY, 1958

This inscription is in type that is larger than in the main text of the Ten Commandments, but smaller than the text in the title.

C. The Context of the Monument

The Municipal Building for the City is in the downtown district and is located on the northwest corner of Second and High Streets. The Municipal Building houses a variety of city offices including the mayor's office, the legal department, the human relations department, the city court, the prosecutor's office, the offices of the court clerk, the city clerk's office, the planning and development office, and the offices of the common council, among others. The City also owns property on two of the other three corners at this intersection which are occupied by the Elkhart Public Library and the County Courts Building.

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[3] The text of the monument actually has eleven commandments. It combines the Protestant and the Catholic versions. However, some contemporary Jewish scholars believe that the original Hebrew word is not "kill" but "murder".

Most of Municipal Building lot is taken up by the building itself, the sidewalks, and the parking lot. However, the City maintains a grass lawn approximately 25 feet wide between the building and the sidewalks along Second and High Street. On the southeast corner of the lawn, the corner nearest the intersection, is a war memorial composed of two monuments. One was donated by the Daughters of the American Revolution to commemorate Revolutionary War Veteran's buried in Elkhart County. It consists of a large stone with a plaque that states:

> "ERECTED BY THE WILLIAM TUFFS CHAPTER Of THE DAUGHTERS Of THE AMERICAN REVOLUTION IN HONOR Of THE REVOLUTIONARY SOLDIERS BURIED IN ELKHART COUNTY. WILLIAMS TUFFS. WALTER DENNY. JOHN PROCTOR. JULY 4, 1932."

Behind the stone is a brick pillar, also with a plaque, that states: "BEHOLD FRIEND, YOU ARE NOW ON HALLOWED GROUND FOR HERE BURNS FREEDOMS HOLY LIGHT" (hereinafter referred to collectively as the "War Memorials"). On the northeast corner, the corner nearest the parking lot, is the larger Ten Commandments monument. Approximately in the center between the two memorials is the main entrance to the Municipal Building. The building also has two other entrances, a public entrance on the south side and one on the northwest side that is primarily used for employees. Over the main entrance to the Municipal Building is a bas relief of an Elk's head flanked on one side by the word "DEDICATVM" and "INCORPORATED 1875" on the other side by the word "JVSTITIAM" and "ERECTED 1915" with the letters "AD" directly above the Elk's head.

The two memorials are approximately the same distance from the entrance, one is forty-six feet, the other forty-eight. They are also about the same distance from the sidewalks, approximately ten feet. The City landscapes both memorials in such a way that from the front they create a balanced effect. Both are partially shaded by trees, and can be seen but not read by a person walking up the sidewalk to the main entrance.

A person walking along the sidewalk towards the intersection could read the text on the Revolutionary War Memorial. A person walking from the main entrance to the parking lot could read the text on the Ten Commandments monument. Both monuments can be seen by a person driving on Second Street, but the text of the Ten Commandments is larger and can be read from further away, with the first two lines visible from approximately sixty feet away. The City maintains numerous other displays of historical significance in and around its public buildings, as well as other memorials dedicated to war veterans, including inside the Municipal Building itself, but none are visible at the same time as the challenged monument.

D. Procedural History

Plaintiff William Books is a resident of Elkhart who first noticed the Ten Commandments monument around 1990, when he was "driving real slow in a delivery truck." In November, 1997, he wrote a letter to the American Civil Liberties Union (the "ACLU") about the monument. *Books Dep. at 23.* In 1998, the Indiana Civil Liberties Union (the "ICLU") contacted the Mayor on behalf of Books and asked the City to remove the monument or they would file a lawsuit. *Response of Elk. at 1.* The City, after considering the request, passed the following resolution:

> WHEREAS, the issue of the Ten Commandments Monument outside Elkhart City Hall has been raised by a person who is represented by the Indiana Civil Liberties Union. The Indiana Civil Liberties Union has contacted the Mayor of the City of Elkhart and has stated that a lawsuit will be filed if the Ten Commandment Monument is not removed.
>
> WHEREAS, in recognition of the historical significance of the Ten Commandments, the Fraternal Order of Eagles presented the Ten Commandment monument to the City of Elkhart in May, 1958. In addition to the Ten Commandments, the Monument contains symbols that reflect the cross cultural and historical significance of the Ten Commandments.

> WHEREAS, the Ten Commandments Monument has stood outside in an unobtrusive location to the north of the entrance of City Hall since 1958. There are numerous other historical and cultural plaques, memorials, and monuments located south of the entrance of city hall, in the foyer just inside the city hall entrance, at the first floor open area of city hall, and at the second and third floor open areas of city hall; and
>
> WHEREAS, the Ten Commandments have had a significant impact on the development of the fundamental legal principles of Western Civilization.
>
> NOW, THEREFORE, BE IT RESOLVED BY THE COMMON COUNCIL OF THE CITY OF ELKHART, INDIANA, THAT:
>
> The Ten Commandments Monument is a historical and cultural monument that reflects one of the earliest codes of human conduct. It is proper for the Ten Commandments Monument to remain and the defense of this position is strongly endorsed.

This resolution was passed and adopted by the Common Council May 4, 1998. As promised, attorneys for Books and Suetkamp, in conjunction with the ICLU, immediately filed this suit in federal district court.

Books states in his affidavit that he must come into direct and unwelcome contact with the monument in order to participate as a citizen of Elkhart, since it is "by the main entrance to the Municipal Building." At times, he must pass the monument to conduct business in the Municipal Building, such as to attend a City Council meeting and to talk to the City Council's Clerk. In addition, Books states that he must pass the monument when driving home from work. Books states that he believes that placing the monument near the entrance of the Municipal Building is an endorsement by government, and that it discriminates against atheists. He states that he does not always look at the monument, but says, "Even if I don't see it, I certainly know it is there. It offends me if I think about it." Books stated that it would be offensive should any acknowledgment of religious history by a

governmental entity be given in a display. *Books Dep.* at 28.

Michael Suetkamp has lived in Elkhart approximately six years. He stated in his Deposition that he learned about the lawsuit when he read about the ICLU's demand to the City to remove the Monument. He too is offended by the monument. Suetkamp states that he too must come into direct and unwelcome contact with the monument in order to participate as a citizen of Elkhart. In addition, he says that he must frequently pass the monument in his daily activities, such as when riding his bicycle, going to the library across the street or conducting business in the area. However, he states that he has never altered his route or made any changes in his ordinary routine in order to avoid the monument. He states that he is deeply offended by the monument and believes it to be an illegal endorsement of religion by the City.

Both parties filed motions for summary judgment almost simultaneously in November, 1998. On January 6, 1999, this Court referred the matter to a Magistrate Judge for the purposes of making a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). The Magistrate Judge heard oral arguments on March 12, 1999 and issued a Report and Recommendation on August 16, 1999, finding in favor of the Plaintiffs. The Defendants filed timely objections to the Magistrate's Report and Recommendation on September 7, 1999 pursuant to 28 U.S.C. § 636(b)(1). This Court must now make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. *Id.* The Magistrate Judge's Report deals thoughtfully with the complex issues raised in this case. That concerned people within the Federal Judiciary would come to different conclusions on the meaning and application of the Religious Clauses in the First Amendment is not uncommon.

IV. JURISDICTION

This cause of action arises under 42 U.S.C. § 1983. Declaratory relief is authorized by Rule 57 of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), and by 28 U.S.C. § 2201. Injunctive relief is authorized by Rule 65 of the Fed. R. Civ. P. Jurisdiction is premised upon 28 U.S.C. § § 1331

and 1343, and venue is proper pursuant to 28 U.S.C. § § 94(a)(3) and 1391.

V. STANDARD OF REVIEW

Both parties in this action have moved for summary judgment pursuant to Fed. R. Civ. P. 56. The standards a court employs in reviewing a motion for summary judgment are well-established. Summary judgment is proper only if the record shows that there is no issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). To determine whether a genuine issue of material fact exists, the court must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party. *King v. Preferred Technical Group*, 166 F.3d 887, 890 (7th Cir. 1999)(citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970).

Where cross-motions for summary judgment are involved, the court looks to the burden of proof that each party would bear on the issue at trial, requiring that party to go beyond the pleadings and affirmatively establish a genuine issue of material fact. *Santaella*, 123 F.3d 456 at 461 (7th Cir. 1997). The court extends to each party the benefit of any factual doubt when considering the other's motions. *Buttitta v. City of Chicago*, 803 F. Supp. 213, 217 (N.D. Ill. 1992), *aff'd*, 9 F.3d 1198 (7th Cir. 1993). "If no genuine issue of material fact exists, the sole question is whether the moving party is entitled to judgment as a matter of law." *Santaella v. Metropolitan Life Ins. Co.*, 123 F.3d 456, 461 (7th Cir. 1997).

VI. STANDING

Plaintiffs face numerous hurdles in bringing a successful claim under the Establishment Clause of the Constitution. Not the least of those is whether the Plaintiffs have standing to bring a constitutional challenge to the presence of the Ten Commandments monument in open space on public property. Standing is a threshold question in every federal case because, if the plaintiffs lack standing to raise their claims in federal court, the court is without authority to consider the merits of the claim. *Freedom from Religion Foundation, Inc. v. Zielke,*

845 F.2d 1463, 1467 (7th Cir. 1988). Article III, Section 2 of the Constitution extends the "judicial Power" of the United States only to "Cases" and "Controversies." *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 118 S. Ct. 1003, 1016, 140 L. Ed. 2d 210 (1998). "The constitutional power of the federal courts cannot be defined, and indeed has no substance, without reference to the necessity 'to adjudge the legal right of litigants in actual controversies.'" *Doe v. County of Montgomery, Ill.*, 41 F.3d 1156, 1159 (7th Cir. 1994)(quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982)(citation omitted). While some elements of the doctrine of standing are based on prudential considerations, the core component of standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992).

The Supreme Court has determined that the "irreducible constitutional minimum of standing" contains three elements. *Steel Co.*, 118 S. Ct. at 1016. First, the Plaintiffs must allege an "injury in fact" — a harm suffered that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical'" *Id.* (citations omitted). Second, there must be causation — the injury must be fairly traceable to the complained-of conduct of the defendant. *Id.* "And third, there must be redressibility — a likelihood that the requested relief will redress the alleged injury." *Id.*

The psychological harm that results from witnessing behavior with which one disagrees is not sufficient to confer standing on a litigant. *Valley Forge*, 454 U.S. at 485-86. A line of cases in the Seventh Circuit Court of Appeals based on the Supreme Court's reasoning in *Valley Forge* seem to indicate that in order for an individual to have standing to challenge the public display of a religious symbol or statement, the individual would have to undertake a "special burden," or alter his or her normal routine in order to avoid the offensive object. *See e.g., Freedom From Religion Foundation v. Zielke*, 845 F.2d 1463 (7th Cir. 1988); *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265 (7th Cir.) *cert. denied,* 479 U.S. 961, 93 L. Ed. 2d 403, 107 S. Ct. 458 (1986) (holding that plaintiffs' allegations that they were offended

by display of a lighted cross on public property could not confer standing; but that plaintiffs had standing because they altered their behavior to avoid seeing the cross); *Harris v. City of Zion, Lake County, Illinois*, 927 F.2d 1401 (7th Cir. 1991), *cert. denied,* 505 U.S. 1218 (1992)(holding that the plaintiffs efforts to avoid viewing the challenged city seal, supported by evidence, were enough to confer standing). That the plaintiffs are offended by the defendants' conduct is not enough to confer standing, the alleged injury must be "distinct and palpable," and not "abstract" or "conjectural" or "hypothetical." *City of Zion*, 927 F.2d at 1404 (quoting *Allen v. Wright*, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1983)). "The injury brought about by a violation of law must . . . affect one's possessions or bodily integrity or freedom of action . . . and not just one's opinions, aspirations or ideology." *Id.* (quoting *People Organized for Welfare and Employment Rights v. Thompson*, 727 F.2d 167, 171 (7th cir. 1984). *See also, Gonzales v. North Tp. Of Lake County, Indiana*, 4 F.3d 1412 (7th Cir. 1993)(holding that the plaintiffs failed to establish taxpayer standing to challenge the presence of a crucifix in a city park, but their discontinued use of the area near the crucifix was sufficient to establish what the Court called "use and enjoyment" standing).

In *Zielke*, the plaintiffs challenged a Ten Commandments monument similar to the one at issue in the present litigation, but located in a city park. *Freedom From Religion Foundation v. Zielke*, 845 F.2d 1463 (7th Cir. 1988). The plaintiffs alleged that they suffered a "rebuke to [their] religious beliefs respecting religion by virtue of being subjected to a governmental endorsement of unequivocally religious precepts and confusions." The Seventh Circuit held that the plaintiffs' claims were exactly the type of psychological harm that the Supreme Court, in *Valley Forge,* said did not confer standing on an aggrieved party. *Id.* at 1468. The court stated that, if the appellants were unwilling to go to Cameron Park because of the presence of the Ten Commandments monument, they would have adequately alleged a distinct and palpable injury because their right to the use of a public park would have been adversely affected by the presence of a possibly unconstitutional display. *Id.* at n.3.

However, in 1994, the Seventh Circuit took a different

tack in *Doe v. County of Montgomery, Illinois*, stating that it was not a requirement for standing to challenge the constitutionality of a religious message that plaintiffs undertake a "special burden" or alter their behavior in some way because of the presence of the message. 41 F.3d 1156, 1160 (7th Cir. 1994). The Court pointed to a passage in *Zielke* stating that the plaintiffs' allegation that she lived close to the offending monument was insufficient to confer standing, although in some circumstances it might suffice. 845 F.2d at 1469. The plaintiff in *Zielke* failed, however, because she did not demonstrate that she lived anywhere near the park, that "the monument is visible in the course of her normal routine, or that her usual driving or walking routes take her past the park." *Id.*

The plaintiffs in *Doe* were citizens of Montgomery County, Illinois, who challenged the constitutionality of a sign over the main entrance to the county courthouse which stated, "THE WORLD NEEDS GOD." *Doe*, 41 F.3d at 1157. The Court held that the plaintiffs met the "injury" requirement for standing by alleging that they must come into direct and unwelcome contact with the city's religious message in order to participate in their local government and fulfill their legal obligations. *Id.* at 1161. The Court held that the plaintiffs' allegations of direct and unwelcome exposure to a religious message could not be distinguished from the claims of other plaintiffs that courts have found to have standing to bring claims under the establishment clause.[4] *Id.*

[4] The Court observed that the "plaintiffs in *Lee v. Weisman, Wallace, Stone, Schempp, and Berger* did not assume "special burdens" or alter their behavior because of religious conduct, yet they had standing to raise their constitutional claims." *Id.* at 1160. The Seventh Circuit cited a long list of Establishment Clause cases to support its holding in *Doe*, but most of the cited cases seem to be distinguishable on the facts because they involved some form of local taxpayer standing. Some involved challenges by municipal taxpayers, who have standing to challenge tax dollar expenditures that allegedly contribute to Establishment Clause violations. *Gonzales*, 4 F.3d at 1416 (citing *Flast v. Cohen*, 392 U.S. 83, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968), and *Zielke*, 845 F.2d at 1470). Others involved challenges by public school students and their

In the present case, the plaintiffs have alleged that in order to participate as citizens of Elkhart, they must come into direct and unwelcome contact with the monument, since it is by the main entrance to the Municipal Building. However, it is approximately forty-six feet from the main entrance to the building and the religious message is not visible to a person entering the building. In contrast, the sign at issue in *Doe* was directly over the door, and could not be missed. The plaintiffs also allege that they can see the monument in the course of their daily activities, when they drive or ride a bicycle past the building, or when they go downtown on other business. However, neither plaintiff alleges that they have ever altered their usual routes to avoid seeing the offending monument.

This Court finds the standing question very close on these facts, especially considering that the current Supreme Court has on more than one occasion narrowed the doctrine of standing applicable here. However, the Seventh Circuit's most recent pronouncement on the issue seems to be dispositive, even though the monument stands at a distance from the entrance to the Municipal Building, and it is conceivable that, at least before this lawsuit, a person could enter the building without noticing it. Because the plaintiffs' allegations seem to fit within the rule of *Doe v. Montgomery*, this Court finds that the scales tilt ever so slightly in favor of the Plaintiffs. Others might not resolve this standing issue in favor of these Plaintiffs, but this Court agrees with the Magistrate Judge's first recommendation, and holds that these Plaintiffs have standing to bring this suit.

VII. DISCUSSION

Having established that the Plaintiffs have standing to bring this suit, the issue before the Court is whether the City's display of a monument on public property containing, among other things, a message that has both religious and historical significance, is prohibited by the First Amendment to the

families, where courts have traditionally found standing based on the coercive nature of public education which makes it much more likely that students might be "subjected to unwelcome religious exercises." In addition, parents usually have taxpayer standing to challenge the use of their tax money for religious purposes.

Constitution. That amendment reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These sixteen words, elegant in their simplicity, have engendered endless litigation as courts have attempted to find in them guidelines for the appropriate relationship between religion and the state.

This steady stream of litigation started in 1947 when Justice Black adopted Thomas Jefferson's metaphor for the relationship between church and state and built it into a "high and impregnable wall" of separation. *Everson v. Board of Education*, 330 U.S. 1, 91 L. Ed. 711, 67 S. Ct. 504 (1947). The metaphor raised more questions than it answered, and has led to the development of no less than five tests for determining when government action passes the wall and becomes a law "respecting an establishment of religion."[5] It should be pointed out that this language requires government to stop at a distance from an actual establishment of a state religion in that it forbids any government action that even tends toward the establishment of religion. However, it does not require that government extirpate every reference to religion, because that would amount to a hostility towards religion which is also prohibited. *Allegheny v. ACLU*, 492 U.S. 573, 656, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989)(Kennedy, J. concurring in part and dissenting in part).

The first difficulty before the court in deciding on a test is determining how to characterize the Ten Commandments. It is not exactly a religious symbol, as in challenges to displays of nativity scenes and Latin crosses, because it has a message. It is not purely a religious message, though, because it has great historical and legal significance in this country. It is close to being a religious free speech issue, but not quite,

[5] The possible tests include the test from *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745; Justice O'Connor's endorsement test, Justice Kennedy's coercion test, the historical precedent test used in *Marsh v. Chambers*, 463 U.S. 783, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983), and the religious speech in a limited public forum test used in *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 115 S. Ct. 2440, 132 L. Ed. 2d 650. These tests will be discussed individually and at length below.

because the donation of the monument to the city means that it is no longer the speech of a private actor in a forum which the City has opened to the public. Neither is it exactly like the issue in *Stone v. Graham*, 449 U.S. 39, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980), the only Supreme Court case dealing with the Ten Commandments, because of the factual differences between a mandate by a State legislature that every public school classroom display a copy of the Ten Commandments, and the passive acceptance by a municipality of a monument like the one in question which it displays in an inconspicuous corner of its property. In Establishment Clause analysis dealing with religious symbols and messages, context is everything.

Therefore, applying any of the Supreme Court's current tests to the issue before the Court requires an extension of current Supreme Court Establishment Clause jurisprudence. Because this Court finds that good arguments can be made for applying any one of these five tests to the facts of this case, this discussion will consider all five. Then, this Court will attempt to determine which test produces results most consistent with the intent and purpose of the First Amendment.

A. The Historical Precedent Test

The United States Supreme Court's "Establishment Clause precedents have recognized the special relevance in this area of Justice Holmes' comment that 'a page of history is worth a volume of logic.'" *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 777 n. 33, 37 L. Ed. 2d 948, 93 S. Ct. 2955 (1973) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 65 L. Ed. 963, 41 S. Ct. 506 (1921). The Supreme Court has more than once conducted a searching examination of our nation's history to bring light to disputes over the meaning and application of the Establishment and Free Exercise Clauses, at the same time assiduously avoiding any construction of "the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history . . . ." *Walz v. Tax Commission*, 397 U.S. 664, 671, 25 L. Ed. 2d 697, 90 S. Ct. 1409 (1970).

In 1983, the Supreme Court was faced with a challenge

to the constitutionality of Nebraska's practice of opening legislative sessions with prayer led by a chaplain paid with public funds. *Marsh v. Chambers*, 463 U.S. 783, 77 L. Ed. 2d 1019, 103 S. Ct. 3330 (1983). As Justice Brennan pointed out in dissent, the Court did not apply any of the formal "tests" from *Lemon* "that have traditionally structured our inquiry under the Establishment Clause," for obvious reasons; strict application of the three prongs of the *Lemon* test would require invalidation of legislative prayer. *Id.* at 796 (Brennan, J., dissenting). Chief Justice Burger, the author of *Lemon*, writing for the majority, first noted that the opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. *Id.* at 786. He further noted that one of the first actions of the original Congress, the same Congress that drafted the Establishment Clause,[6] was to authorize the appointment of chaplains for both houses of Congress paid for out of the public treasury, clearly indicating that the men who wrote the First Amendment did not view paid legislative chaplains and opening prayers as a violation of that Amendment. *Id.* at 788. The Court went on to say:

> Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the first Congress - their actions reveal their intent.

[6] The same Congress that passed the First Amendment also re-enacted the Northwest Ordinance. The "Northwest Ordinance of 1787 — which was enacted contemporaneously with the drafting of the Constitution and re-enacted by the First Congress — established a bill of rights for a territory that included what is now Ohio, Indiana, Michigan, Wisconsin, and part of Minnesota." *City of Boerne v. Flores*, 521 U.S. 507, 553, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997) (O'Connor, J. dissenting). Article III of the Ordinance declared: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

Marsh, 463 U.S. at 790. Even though Madison,[7] the drafter of the First Amendment, later expressed doubts concerning the chaplaincy practice, the Court held that evidence of opposition to a measure does not weaken the force of the historical argument; "indeed it fuses it with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly . . . ." *Id.* at 791. The Court said,

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.

Id. at 792. The Court reasoned that "legislative prayer presents no more potential for establishment" than practices previously upheld, such as grants for higher education at religious institutions,[8] and tax exemptions for religious organizations.[9] *Id.* at 791.

In *Lynch v. Donnelly*, Chief Justice Burger, again writing

[7] Madison also expressed doubts about other practices. As President, he "proclaimed days of religious fasting and thanksgiving and later explained that he thought this permissible because the proclamations were "merely recommendatory" and because the Constitution is not concerned with trifles." *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (1987) (Easterbrook, J. dissenting, citing Levy, The Establishment Clause 100). "Jefferson, who refused on separationist grounds to issue thanksgiving proclamations, nonetheless signed treaties sending ministers to the Indians." *Id.*

[8] *See Tilton v. Richardson*, 403 U.S. 672, 29 L. Ed. 2d 790, 91 S. Ct. 2091 (1971).

[9] *See Walz v. Tax Comm'n*, 397 U.S. 664, 25 L. Ed. 2d 697, 90 S. Ct. 1409 (1970).

for the Court, said: "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." 465 U.S. 668, 674-75, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984). The Court in *Lynch* found that "our history is replete with official references to the value and invocation of divine guidance," and that this was evidenced by our national motto, "In God we Trust";[10] national holidays such as Christmas and Thanksgiving; and the mural of Moses holding the Ten Commandments in the chambers of the Supreme Court. *Id.* at 675-77. The national motto, "In God we Trust" is prominently engraved above the speaker's dias in the chamber of the United States House of Representatives. *See County of Allegheny*, 492 U.S. at 673. It is also engraved over the entrance to the Senate chambers. *See Engel*, 370 U.S. 421 at 440 n.5, 82 S. Ct. 1261, 8 L. Ed. 2d 601.

Another practice that is deeply embedded in our history and traditions is the use of religious oaths and supplications. "This background is evidenced today in our public life through the continuance in our oaths of office from the Presidency to the Alderman of the final supplication, 'So help me God.'" *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 213, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963). Every justice or judge of the United States is required by law to take an oath to faithfully and impartially discharge the duties of office "So help me God." 28 U.S.C. § 453. Justice Stewart noted in *Engel v. Vitale*, 370 U.S. 421, 446, 8 L. Ed. 2d 601, 82 S. Ct. 1261 (1962) that "at the opening of each day's Session of this Court, we stand, while one of our officials invokes the protection of God. Since the

[10] The constitutionality of the national motto has been upheld by three circuit courts. *See Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996); *O'Hair v. Murray*, 588 F.2d 1144 (5th Cir.) (per curiam) *cert. denied*, 442 U.S. 930 (1979); *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970). In the most recent case, the Tenth Circuit held that statutes establishing "In God we Trust" as the national motto and requiring its use on coins and on the printed currency of the United States, was constitutional under both a *Lemon* analysis and an endorsement analysis. *Gaylor*, 74 F.3d at 216-217.

days of John Marshall our Crier has said, 'God save the United States and this Honorable Court.'" The National Anthem,[11] and the Pledge of Allegiance contain references to God. In addition, Congress has enacted legislation providing for a National Day of Prayer, 36 U.S.C. § 119 (enacted May 11, 1950, recodified August 12, 1998), and Memorial Day as a day of prayer for permanent peace, 36 U.S.C. § 116 (enacted April 17, 1952, recodified August 12, 1998).

In summary, as Chief Justice Burger said in *Marsh*, these practices do not violate the First Amendment's Establishment Clause because they have become part of "the fabric of our society." *Marsh*, 463 U.S. at 792.

Speaking of *Marsh* in his dissent in *Allegheny*, Justice Kennedy, writing for four justices, said

> *Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings. Whatever test [the court chooses] to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion.

Allegheny, 492 U.S. at 670. This view has gained some support in lower courts, including the Seventh Circuit, but has never been adopted by a majority of the Supreme Court.

The Court now turns to an analysis of the Ten Commandments monument under the Supreme Court's decision in *Marsh*, but without the help of Justice Kennedy's interpretation of the case. If one characterizes the issue as whether the national government of the United States has a long and unbroken tradition of displaying monuments of the Ten Commandments, dating back to the time the First Amendment was drafted, the question answers itself. The

[11] The National Anthem was adopted by official act of Congress in 1931. See 36 U.S.C. § 170. It concludes with a reference to the national motto which says, "In God is our trust."

practice of displaying monuments of the Ten Commandments began in the 1940's, a little over half a century ago. But maybe a more appropriate inquiry would be whether this nation has a long and unbroken tradition of acknowledging the importance of the Bible such that portions of it have become part of the "fabric of our society." The answer to this question requires a little more consideration.

The first official recognition of the importance of the Bible took place while the Colonies were still at war with England. *The Journals of the Continental Congress, September 11, 1777.*[12] The Continental Congress adopted a resolution to import 20,000 Bibles from Holland, Scotland, or elsewhere because they could no longer be purchased from England.[13] *Id.*

Five years later, an American printer named Aitken, at his own expense, finally produced an American version of the Bible and had it ready to print. *Journals of the Continental Congress, September 12, 1782.* The Continental Congress did not advance him any money, but they did pass the following resolution: "Whereupon, Resolved, That the United States in Congress assembled, highly approve the pious and laudable undertaking of Mr. Aitken, as subservient to the interest of religion as well as an instance of the progress of arts in this county, and being satisfied from the above report, of his care

[12] *Journals of the Continental Congress, Thursday, September 11, 1777.*

[13] *Id.* The resolution was based on the recommendation of a committee headed by Dr. Allison, after determining it would be too expensive for the Congress to get an American version of the Bible ready for print. *Id.* The report recommended "that the use of the Bible is so universal, and its importance so great, that your committee refer to the consideration of Congress, and if Congress shall not think it expedient to order the importation of types and paper, your committee recommend that Congress will order the Committee of Commerce to import 20,000 Bibles from Holland, Scotland, or elsewhere, into the different ports of the states in the Union:" *Id.* Although the resolution passed, implementation was postponed because of the concern of the opposition over funding. *Id.* It was eventually tabled for the same reason. *Id.*

and accuracy in the execution of the work, they recommend this edition of the Bible to the inhabitants of the United States, and hereby authorize him to publish this recommendation in the manner he shall think proper." *Id.* Many of the same men who served in the Continental Congress were among those who later approved the First Amendment. These resolutions shed at least a little light on the significance of the Bible to early members of Congress.[14]

In *Stone v. Graham,* the Supreme Court said that "the Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths . . ." 449 U.S. at 41,[15] but that does not necessarily mean that the City of Elkhart must take down this monument. It is no more religious than the national motto, "In God we Trust," and no more pervasive than the presence of the motto on national coins and currency. In addition, testimony on the Ten Commandments by certified religious

[14] A little more light was shed by Alexis de Tocqueville writing about Americans around 1850. He said, "For Americans, the ideas of Christianity and liberty are so completely mingled that it is almost impossible for them to conceive of the one without the other . . . How could society escape destruction if, when political ties are relaxed, moral ties are not tightened? And what can be done with a people master of itself if it is not subject to God?" Alexis de Tocqueville, Democracy in America, 293-94 (J. P. Mayer, ed., George Lawrence, trans. Harper Perennial 1988) (1850).

[15] When the issue of the Ten Commandments came before the Tenth Circuit for the second time in 1997, the Court discussed its earlier opinion in *Anderson,* in which it stated that the Ten Commandments is primarily secular and not religious in character. *Summum v. Callaghan,* 130 F.3d 906, 910 n.2. (1997). The Court said, "Although we recognized the religious nature of the Ten Commandments, we also noted its 'substantial secular attributes' as a precedent legal code." *Id.* The Court observed that more recent cases, including a Supreme Court decision, cast doubt on the validity of the conclusion that the Ten Commandments is primarily secular in nature. *Id.* This does not mean that the Tenth Circuit overruled *Anderson,* as the Plaintiffs allege, simply that one of its bases is no longer sound. The rest of the analysis is still good law until expressly overruled, although not binding on this Court.

experts in other cases[16] involving the issue tends to establish that the Ten Commandments have now become a "part of our public life."[17] *See Suhre v. Haywood County, North Carolina*, 55 F. Supp. 2d 384, 391-92 (W.D.N.C. 1999); *Colorado v. Freedom From Religion Foundation*, 898 P.2d 1013, 1024 n.17 (1995). Therefore, this Court holds that the historical precedent analysis from *Marsh v. Chambers* weighs in favor of holding that the presence of the Ten Commandments monument on city property does not violate the Establishment Clause.

B. The Lemon test

The *Lemon* test was first developed by Chief Justice Burger in *Lemon v. Kurtzman*, a school case challenging the constitutionality of state aid to nonpublic schools. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971). It requires a three part analysis for determining whether a challenged statute is permissible under the Establishment Clause: 1) the statute must have a secular

[16] In *Colorado*, the Court cited a theology expert witness for the State, who testified that:

> even though there are elements of this monument that are overtly religious, the monument can also be seen to harken back to those moral languages, those two streams that developed our sense of law, and that it is possible to construe this monument as being a monument to the fact that we as a republic are a people who pay attention to law . . . . I think it is possible to construe [commandments] two through ten as being examples of law that this country has observed from its very beginning.

[17] In *Suhre*, the expert witness testified that certain portions of the Bible such as "love your neighbor," portions of Proverbs, the Beautitudes, and the Book of Romans. *Suhre*, 55 F. Supp. 2d at 392. "As part of public life, the influence of such phrases is no longer dependent on one's religious views, but is 'there day by day for persons who do not believe in God, for persons who believe moderately in God, for persons who believe nothing but in God. They influence the lives of numerous persons not as Commandments, but as a public moral statement guiding their conduct." *Id.*

purpose; 2) its primary effect must be one that neither advances nor inhibits religion; and 3) the statute must not foster an excessive entanglement with religion. *Id.* "If a statute violates any of these three principles, it must be struck down under the Establishment clause." *Stone v. Graham*, 449 U.S. 39, 41, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980). For a while, it seemed that the Court had settled on a one-size-fits-all analysis for all Establishment Clause violations. In the first twenty years after the introduction of the *Lemon* test, the Supreme Court only decided one Establishment Clause challenge without reference to *Lemon*, the case of *Marsh v. Chambers*, 463 U.S. 783, 77 L. Ed. 2d 1019, 103 S. Ct. 3330 (1983), discussed above. However, discontent with the test was mounting, finally finding full expression in 1993 in Justice Scalia's stinging criticism of the test in his concurring opinion in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 397-401, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993). Justice Scalia suggested that the secret of the *Lemon* test's survival is that it is so easy to kill. *Id.* at 398. "When we wish to strike down a practice it forbids, we invoke it . . . when we wish to uphold a practice it forbids, we ignore it entirely . . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him." *Id.*

Writing in February, 1997, one commentator noted that, except for the decision in *Lamb's Chapel*, the Court's last six establishment clause cases were decided on other theories, without citation to *Lemon*. *See*, Michael W. McConnell,[18] "Stuck with a Lemon," 83-FEB A.B.A.J. 46. Then, in 1997, the Court once again invoked *Lemon*, this time to overrule a decision that had scarcely been on the books ten years and that involved essentially the same parties and the same practice by the State of New York. *Agostini v. Felton*, 521 U.S. 203, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997), *overruling Aguilar*

[18] Michaell W. McConnell, currently Presidential Professor, University of Utah College of Law, was formerly a University of Chicago Law School Professor and of counsel at Chicago's Mayer, Brown & Platt. He has briefed or argued a number of Establishment Clause cases before the Supreme Court, and his articles have been cited on several occasions by the Seventh Circuit.

v. Felton, 473 U.S. 402, 87 L. Ed. 2d 290, 105 S. Ct. 3232 (1985). In *Agostini*, the Court determined that its previous decision misapplied the test in *Lemon*, and a new analysis using the three-part test reached an opposite conclusion as to the constitutionality of the state's practice. *Id*

The problem for lower courts is that, while the Supreme Court is free to ignore precedent and try to develop a test that will best promote the underlying objectives of the Establishment Clause, they are not. In the two years between 1995 and 1997, all twelve of the federal courts of appeal, and almost all of the state supreme courts concluded that Lemon remains the constitutional standard. McConnell, "Stuck with a Lemon" at 47. "Thus they remain mired in the inconsistencies, ambiguities, and anti-religious bias that the Court avoids by ignoring *Lemon*." *Id.* Because the Supreme Court has never officially overruled *Lemon*, the plaintiffs' challenge to the constitutionality of the Ten Commandments monument must be run through the *Lemon* analysis.

1. Lemon: The Secular Purpose Prong

The first prong of *Lemon* tells the Court that in order to be constitutional, government action must have a secular purpose. As a general rule, courts are deferential to decisions of the other branches of government and accept their stated purpose. *Edwards v. Aguillard*, 482 U.S. 578, 586-87, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987). Where the government asserts a secular justification for its actions, it bears the burden of producing evidence to support that justification. *Bridenbaugh v. O'Bannon*, 185 F.3d 796, 797 (citing *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995). A secular purpose need not be an exclusive one; it is sufficient if the government has a secular purpose. 185 F.3d at 800 (citing *Lynch v. Donnelly*, 465 U.S. 668, 681 n. 6, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984)). However, the stated purpose must be sincere and cannot be a sham. 185 F.3d at 801 (citing *Edwards*, 482 U.S. at 586-87).

The Supreme Court applied the *Lemon* test in *Stone v. Graham*, 449 U.S. 39, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980), the one case in which it directly addressed a government

display of the Ten Commandments.[19] In 1981 when *Stone* was decided, the *Lemon* test reigned supreme in Establishment Clause jurisprudence. In *Stone*, the Court held that Kentucky's statute requiring every public school classroom to display a copy of the Ten Commandments violated the Establishment Clause. *Id.* Over a four justice dissent written by then-Justice Rehnquist, the court ruled without hearing oral arguments that the statute failed on the first prong of the test because the pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. *Id.* at 41.

The Court reached this conclusion despite a stated secular purpose by the Kentucky legislature, accepted by the Kentucky courts, that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World. *Id.* at 45. Justice Rehnquist in his dissent described this as "a cavalier summary reversal, without benefit of oral argument or briefs on the merits, of the highest court of Kentucky." *Id.* at 47. In his dissent in *Edwards*, Justice Scalia, joined by Chief Justice Rehnquist, pointed out the dangers inherent in attempting to discover, not the objective purpose of legislation as stated, but the subjective motivation of those who enacted it, and the uncertain guidance it provides to those who must determine the constitutionality of their actions.[20]

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[19] Justice Stevens also commented on the Ten Commandments in a concurring opinion in *Allegheny*, in which he was joined by Justices Brennan and Marshall.

[20] Specifically, Justice Scalia stated:

> Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional. We have said essentially the following: Government may not act with the purpose of advancing religion, except when forced to do so by the Free Exercise Clause (which is now and then); or when eliminating existing governmental hostility to religion (which exists sometimes); or even when merely accommodating governmentally uninhibited religious practices, except that at some point (it is unclear where)

In 1995, the Colorado Supreme Court found a secular purpose for the State's display of an FOE Ten Commandments monument in the state park adjacent to the State Capitol Building. *State v. Freedom From Religion Foundation*, 898 P.2d 1013 (Colo. 1995). The Court found that the State had no record of how the monument came to be in the park, but several state employees testified that the State had a neutral policy in accepting displays for the park that reflected a purpose of making the space available for a variety of groups interested in utilizing the valuable state grounds. *Id.* at 1024. The State's acceptance did not indicate a purpose to endorse the message on any of the monuments. *Id.* In the absence of direct evidence of the State's purpose, and considering the State's generally neutral policy in accepting monuments for the park, the Court concluded that acceptance of the gift by the State, without other evidence, indicated the State's assent to the FOE's stated secular purpose. *Id.* They accepted statements in an affidavit from E .J. Ruegemer, the originator of the program, that the FOE's purpose in donating the monument was entirely secular and part of an effort to promote moral standards among young people. *Id.* at n. 16. The fact that the FOE is not a religious organization weighed heavily in favor of finding that its purpose was secular. *Id.*

In the Elkhart Ten Commandments case, the Magistrate Judge recommended finding an improper religious purpose based on a determination that it serves a secular purpose today. The Magistrate Judge found that the stated purpose of the FOE was counterbalanced by religious statements made during an unveiling ceremony by several area religious leaders, as reported in local newspapers, making the issue a wash at the time the monument was donated in 1957. However, this analysis begs the question whether the City of Elkhart had a secular purpose or a religious one in accepting and displaying the Ten Commandments monument. In *Epperson v. Arkansas*,

> intentional accommodation results in the fostering of religion, which is of course unconstitutional. But the difficulty of knowing what vitiating purpose one is looking for is as nothing compared with the difficulty of knowing how or where to find it. For while it is possible to discern the objective "purpose" of a statute (i.e., the public good at which its provisions appear to be directed), or even the

393 U.S. 97, 21 L. Ed. 2d 228, 89 S. Ct. 266 (1968), the Supreme Court was willing to look back almost 40 years to find an unconstitutional religious purpose for Arkansas' anti-evolution statute. However, nothing in the record reveals the purpose of the Elkhart Common Council in accepting the monument. It was donated as part of a National Youth Guidance Program, and unveiled as part of the City's Memorial Day festivities. Congress had only recently declared Memorial Day a national holiday for the purpose of praying for peace.[21] Certain religious leaders and the head of the VFW spoke at the ceremony, but none of the speakers represented the City of Elkhart.

The facts of the Elkhart case are almost identical to those in Colorado. The key evidence in determining the intent of the FOE was a copy of the same letter that is in evidence before this court written by E.J. Ruegemer, the juvenile justice judge who originated the program. This Court agrees with the reasoning of the Colorado Supreme Court, and attributes the intent of the donor to the donee, the City of Elkhart. The City's purpose, promoting morality among its youth, is a legitimate aim of government and traditionally part of the police powers of the state.

The record does, however, contain a statement from the

> formal motivation for a statute where that is explicitly set forth (as it was, to no avail, here), discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. *Edwards*, 482 U.S. at 636.

[21] Interesting enough, both parties state in their briefs that Memorial Day is a secular holiday. However, the statute enacted by Congress in 1998 reads as follows:

> The President is requested to issue each year a proclamation-
>
> (1) calling on the people of the United States to observe Memorial Day by praying, according to their individual religious faith, for permanent peace;
>
> (2) designating a period of time on Memorial Day during which the people may unite in prayer for a permanent peace;
>
> (3) calling on the people of the United States to unite in

Elkhart Common Council dated May 4, 1998 concerning the Ten Commandments monument, written in response to the plaintiffs request that they remove it. Since this document represents a statement by the Council of reasons for keeping the monument as part of its display on the lawn of the Municipal Building, it is relevant in determining the City's current purpose. In its resolution, the City states its intention to maintain a number of exhibits on City property of cultural and historical significance, of which the Ten Commandments monument is just one. The various exhibits are described in considerable detail in the Defendant's briefs. Therefore, the Court finds that the City of Elkhart had a secular purpose originally in accepting the Ten Commandments monument, and that it has successfully stated a secular purpose for continuing to display the monument on City property.

2. Primary Effects and Excessive Entanglement

This section will discuss the second and third prongs together, since the Supreme Court recently collapsed the two-part analysis into one. *See Agostini v. Felton*, 521 U.S. 203, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997). The third prong of the *Lemon* test has been called the Catch-22 of Establishment Clause jurisprudence. For example, if a school system set up a program allowing public school teachers to teach remedial classes in parochial schools in order to make federal Title VII funds available to all students, the program had to be carefully monitored to make sure the teachers receiving public funds were not inculcating religion. *Aguilar v. Felton*, 473 U.S. 402, 87 L. Ed. 2d 290, 105 S. Ct. 3232 (1985). But, that very monitoring process created an excessive entanglement of government and religion and rendered the program unconstitutional. *Id.*

In *Agostini*, the Supreme Court responded to this problem and tinkered once again with the *Lemon* test. *Agostini*, 521 U.S. 203, 138 L. Ed. 2d 391, 117 S. Ct. 1997. The Court downgraded the excessive entanglement prong and made it part of the primary effects analysis, one of three criteria which the Court said it uses to evaluate whether government aid has the effect of advancing religion. *Id.* at 234. The other two are: 1) that it does not result in governmental indoctrination, or 2) define its recipients by reference to religion. *Id.* As a

separate analysis, the Court also determined that the state aid program at issue could not possibly be viewed as an endorsement of religion. *Id.* Since that analysis has taken on a life of its own under the rubric of "the endorsement test," it will be considered separately in Section VII(C) below.

In a recent case in the Seventh Circuit, the Court considered whether *Agostini* required a change in its Establishment Clause analysis. *See Bridenbaugh v. O'Bannon*, 185 F.3d 796, 797-98 (1999). The Seventh Circuit noted that in *Agostini*, the Supreme Court reaffirmed "the general principles we use to evaluate whether government aid violates the Establishment Clause." *Bridenbaugh*, 185 F.3d at 798 (quoting *Agostini*, 521 U.S. 203, 222-23 (1997)). Therefore, the Seventh Circuit found that application of the test from *Lemon* remains largely unchanged. *Id.* It stated that the Court continues to ask whether the government acted with the purpose of advancing or inhibiting religion, whether the aid has the 'effect' of advancing or inhibiting religion, and whether the governmental action resulted in an excessive entanglement between religion and the state. *Id.* (citing *Agostini*, 521 U.S. at 222-23).

The plaintiff in *Bridenbaugh* challenged the constitutionality of Indiana's Good Friday holiday for State employees. 185 F.3d at 797. The Court held that the State met its burden of proof on the secular purpose prong by establishing that its secular justification was to provide state employees with a long weekend for a spring holiday. *Id. at 799.* The Court reasoned that the fact that the holiday coincided with a day that has religious significance for Christians did not turn its purpose into a religious one. *Id.* The Court stated that if it did, Sunday closing laws and holidays for Christmas and Thanksgiving would also have to be invalidated, practices which have been upheld by the Supreme Court. *Id.* (citing *McGowan v. Maryland*, 366 U.S. 420, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961), and *Lynch v. Donnelly*, 465 U.S. 668, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984)).

In evaluating the primary effect of the State's Good Friday holiday, the Court never mentioned the three criteria which *Agostini* suggested should be used to determine if government aid has the prohibited effect of advancing or inhibiting religion. *Agostini,* 521 U.S. at 204. Instead, the Court held that on

these facts, the plaintiffs' argument, that the principal effect of the holiday was to advance religion and represented an endorsement of religion because there was no secular justification for the Good Friday holiday, failed with his first allegation because the two arguments dovetailed. *Bridenbaugh*, 185 F.3d at 801.

The Court held that the plaintiffs' second argument, that the Good Friday holiday advances religion because it makes it easier for Christians to practice their faith by having the day off, also failed because the Supreme Court has made clear that "not every law that confers an 'indirect, remote, or incidental' benefit upon religion is for that reason invalid." *Id.* (quoting *Lynch,* 465 U.S. at 683). The Court pointed out that no court has ever invalidated a state holiday merely because it has the indirect effect of making it easier for people to practice their faith. 185 F.3d at 801-02. The Court did not discuss the third prong of *Lemon* because the plaintiff did not allege that the holiday created an excessive entanglement between religion and the state. *Id.* at 798.

As in *Bridenbaugh*, the Plaintiffs in the case before this Court have devoted their brief to establishing that the City of Elkhart lacks a secular purpose, and that its placement of the Ten Commandments monument on the Municipal Building lawn has the prohibited effect of advancing religion. They do not allege that the Defendant's conduct creates an excessive entanglement with religion. Nor do the Plaintiffs mention in their brief the three factors in *Agostini* that the Supreme Court said it currently uses to evaluate whether government aid has the effect of advancing religion. Instead, they used Justice O'Connor's endorsement test to support their claims as the appropriate test to determine the constitutionality of the Defendant's actions. The reason for this is clear. The Court included as part of its primary effects analysis two requirements that do not fit in situations outside the context of government aid to religion: 1) that the government aid does not result in governmental indoctrination, and 2) that it does not define its recipients by reference to religion. *Agostini,* 521 U.S. at 204. Although the Circuit Courts of Appeal that have addressed the viability of *Lemon* after *Agostini* agree that *Lemon* has not been overruled, only one Court has applied *Agostini* outside the context of government aid to parochial schools, and that

was the Seventh Circuit in *Bridenbaugh*. As already mentioned, *Bridenbaugh* applied *Lemon*, but not the Supreme Court's newest three-part test from *Agostini*. In cases of religious symbols and messages in the public square like the case before this Court, there are no recipients and no one is being indoctrinated. People are free to read the monument or ignore it as they choose. Therefore, the Court finds that the *Lemon* test is not helpful in this case unless applied in the form of the endorsement test, as discussed in the next section.

C. The Endorsement test

The Endorsement test is a refinement of the *Lemon* test that was first proposed by Justice O'Connor in *Lynch v. Donnelly* as a way to determine the primary effects of a government action. *Lynch,* 465 U.S. at 688. To be constitutional under the *Lemon* test, a governmental action could not have the primary effect of either advancing or inhibiting religion. *Id.* at 691. The majority in *Lynch* applied the *Lemon* test and based on its analysis, held that the city's inclusion of a creche as part of its overall celebration of the holiday season did not violate the *Establishment Clause.* 403 U.S. at 668. Justice O'Connor, however, pointed out that several Supreme Court decisions had upheld government practices which had the effect of advancing religion, including *Walz v. Tax Comm'n,* 397 U.S. 664, 25 L. Ed. 2d 697, 90 S. Ct. 1409 (1970)(upholding tax exemptions for religious, educational, and charitable organization); *McGowan v. Maryland*, 366 U.S. 420, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1960) (upholding mandatory Sunday closing laws); and *Zorach v. Clauson* 343 U.S. 306, 96 L. Ed. 954, 72 S. Ct. 679 (1952)(upholding released time from school for off-campus religious instruction). She says what is crucial is that the government practice not have the effect of communicating a message of government endorsement or disapproval of religion to a reasonable observer. *Id.*

Justice O'Connor stated that she did not believe that the display of the creche communicated a message that the government intended to endorse the Christian beliefs represented by the creche. 397 U.S. at 692. She reasoned that, although the religious and sectarian significance of the creche was not "neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to the

purpose of the display - as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Id.* She found the government's display of the creche in the setting of a general display celebrating the Christmas holiday to be

> no more an endorsement of religion than such governmental 'acknowledgments' of religion as legislative prayers of the type approved in *Marsh v. Chambers*, government declaration of Thanksgiving as a public holiday, printing 'In God We Trust' on coins, and opening court sessions with 'God save the United States and this honorable court.' Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying governmental approval of particular religions.

397 U.S. at 692-93 (citations omitted).

Justice Blackmun adopted the endorsement test in *County of Allegheny v. A.C.L.U.*, 492 U.S. 573, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989), stating that Justice O'Connor's test "provides a sound analytical framework for evaluating governmental use of religious symbols." *492 U.S. at 595.* In a concurring opinion, O'Connor summarized the endorsement test, noting that the approach requires the court to judge every government practice "in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Id.* at 624-25 (quoting *Lynch, 465 U.S. at 694).* While noting that some government acknowledgments of religion may serve secular purposes and, because of their "history and ubiquity" do not convey a message of endorsement of particular religious beliefs, she stated that "government practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny." *492 U.S.* at 625. She stated that "endorsement sends

a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are political insiders, favored members of the political community." *Id.* This violates the Establishment Clause, which "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." *Id.*

In *Capitol Square Review and Advisory Board v. Pinette,* 515 U.S. 753, 780, 132 L. Ed. 2d 650, 115 S. Ct. 2440 (1995), Justice O'Connor refined the endorsement approach even further. In *Capitol Square*, the Court split over the appropriate test to use. Justice Kennedy writing for four justices in the plurality opinion, used the analysis for private speech in a public forum, as discussed in Section VII(E) below. Five justices agreed that the endorsement test should be used, but came to three different conclusions as to how it should be applied and what result it would produce.

Justice O'Connor, writing for three justices in a concurring opinion, concluded that the test was an objective one that should not focus on the actual perception of individual observers. *Id.* at 779. She said that the Court does not ask whether there is any person who could find an endorsement of religion, or whether some people may be offended by the display, or whether some reasonable person might think the State endorses religion because there are always some who reasonably might perceive a particular action as an endorsement of religion. *Id.* at 780. Instead, according to Justice O'Connor, the "reasonable observer" in the endorsement is inquiry "deemed aware of the history and context of the community and the forum in which the religious display appears." *Id.* She stated that "the 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." *Id.* (quoting *Allegheny*, 492 U.S. at 630). Once the reasonable observer is charged with knowledge of the history and context of the display, then the analysis begins to resemble the approach in *Marsh v. Chambers.*[22]

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prayer at that time; and

(4) calling on the media to join in observing Memorial Day

Cases where the Seventh Circuit has applied the endorsement test are sparse. In *Bridenbaugh*, the Court mentioned the endorsement test, but determined that *Lemon* was still the appropriate test to use. In *Grossbaum v. Indianapolis-Marion County Building Authority*, 63 F.3d 581, 595 (1995), the Court relied on recent Supreme Court forum cases and held that the placement of a menorah in the lobby of the City-County Building in Indianapolis, pursuant to a neutral policy of allowing expression on the holiday season, raised no Establishment Clause concerns of such countervailing importance as to outweigh the plaintiffs' right to free expression. Judge Ripple, writing for the Court, mentioned O'Connor's endorsement test and its sensitivity to context. *Id.* He commented on the Court's holding in *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (1987), and noted that the nativity scene at issue in Chicago was unconstitutional despite disclaimer signs because it communicated "a message of government endorsement." *Id.* The centrality of location of the nativity scene in Chicago's City Hall "did not lend itself to the interpretation that it was the expression of one speaker in a forum open to all." *Id.*

In *Harris v. City of Zion, Lake County, Ill.*, 927 F.2d 1401 (7th Cir. 1991), a divided three judge panel held that use of the Christian cross on a city's seal represented an unconstitutional endorsement of religion. Judge Easterbrook in dissent stated that "the first amendment, as I understand it, forbids taxation and coercion in support of religion but does not forbid the display of religious symbols." *Id.* at 1423 (citing *Allegheny County v. ACLU*, 492 U.S. 573, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989) (Kennedy, J. dissenting). Judge Easterbrook observed that "Zions's seal has been in use for 89 years without stifling religious diversity or slowing the conversion of a religious enclave to a secular city." *Id.*

Judge Easterbrook also dissented in *American Jewish Congress*, 827 F.2d at 128, where he said that the endorsement test created the kind of multi-factor balancing test that "gives judges of the inferior federal courts fits." Noting that the rule requires judges to examine each symbol's context, he says the problem is in knowing which items of context matter. *Id.* at 129. "If different elements cut in different directions, what is to be done?" *Id.* Finally, he said, "It is discomfiting to

think that our fundamental charter of government distinguishes between painted and white figures - a subject the parties have debated - and governs the interaction of elements of a display, thus requiring scrutiny more commonly associated with interior decorators than with the judiciary." *Id.* He argued that to hold that the City of Chicago may not use a symbol showing "the religious origin and significance of a national holiday is to extend Jefferson's 'wall of separation' metaphor beyond its proper scope." *Id.* Yet three years later, writing for two judges on a three judge panel, Judge Easterbrook stated that under the approach in *Lynch*, even a herd of reindeer and a forest of jumbo candy canes could not neutralize the effect of a Catholic mass that was to be held at a city festival honoring its Italian heritage. *Doe v. Village of Crestwood, Ill.*, 917 F.2d 1476 (1990). It seems Judge Easterbrook would find a dividing line somewhere between displaying a symbol of religious significance, and performing a religious ceremony.

Cases in other circuits dealing specifically with the Ten Commandments have looked to the context of the display in evaluating whether it gives the appearance of government endorsement of religion. *Suhre v. Haywood County, North Carolina*, 55 F. Supp. 2d 384 (W.D.N.C. 1999); *Harvey v. Cobb County, Georgia*, 811 F. Supp. 669 (N.D.Ga. 1993)(holding display of two religious texts, the Ten Commandments and the "Great Commandment" of Jesus which are of particular significance to the Christian religion, high on the wall of a courthouse, without any countervailing secular passages or symbols, violated the establishment clause); *State v. Freedom From Religion Foundation, Inc.*, 898 P.2d 1013, 1018-19 (Colo.1995)(holding *en banc* that the monuments' content, including both the language of the Ten Commandments and the surrounding symbols and instructions, and its setting among several much more prominent monuments in Lincoln Park and throughout the Capitol Complex Grounds sufficiently neutralized its religious character resulting in neither an endorsement nor a disapproval of religion).

Courts and commentators alike frequently base their analysis of the context on Justice Stevens concurring opinion in *Allegheny*, in which he discussed the frieze on the south wall of the United States Supreme Court, and in which he

advocated application of a strong presumption against the public use of religious symbols. *Allegheny,* 492 U.S. at 652-53. Justice Stevens was joined by Justice Brennan and Justice Marshall, concurring in part and dissenting in part. *Id.* at 646. This strong presumption would prohibit a display only when its message is nonsecular when evaluated in the context in which it is presented. *Id.* Justice Stevens goes on to say

> For example, a carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an equivocal message, perhaps of respect for Judaism, for religion in general, or for law. The addition of carvings depicting Confucius and Mohammed may honor religion, or particular religions, to an extent that the First Amendment does not tolerate any more than it does "the permanent erection of a large Latin cross on the roof of city hall." Placement of secular figures such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside these three religious leaders, however, signals respect not for great proselytizers but for great lawgivers. It would be absurd to exclude such a fitting message from a courtroom, as it would be to exclude religious paintings by Italian Renaissance masters from a public museum.

Id. (citations omitted). Justice Stevens dissented again in *Capitol Square*, 515 U.S. at 797, based on his view that the Establishment Clause should be construed to require a strong presumption against the installation of unattended religious symbols on public property. He used the establishment test, but disagreed with Justice O'Connor and the two justices who joined her concurring opinion that the reasonable observer should be presumed to be familiar with the history and context of the display. *Id.* at 800, n. 5. No justices joined him in this dissent. Therefore, this Court declines to use his "strong presumption" test and finds that his illustration is not helpful in analyzing the present case.

The Magistrate Judge recommended finding that the City's Ten Commandments monument violates the Establishment Clause, citing the above text from Stevens. This single concurring opinion is far too slender a reed to compel the

granting of an injunction, given the overall content of the Supreme Court's jurisprudence on the Religion Clauses of the First Amendment, especially as it pertains to inscriptions on public buildings. This is true with no disrespect intended towards the Justice or the Magistrate Judge.

It is self-evident that if a person stands close enough to a religious symbol, it will not appear to be in the context of a larger display. The question, then, is whether a reasonable observer, familiar with the content of the Ten Commandments monument and its context, would believe that the City of Elkhart was endorsing a particular religious belief. In examining the content, the Court must consider everything on the face of the monument and the historical and cultural importance of those items. In evaluating the context, the Court must look beyond the immediate location of the monument and determine if it is part of a larger display by the City of various items of historical and cultural importance, as the City claims. Finally, the Court must determine if the monument's location near the seat of power tips the scales towards finding that a reasonable observer might think the City is endorsing religion.

Regarding the content of the monument, other courts have had before them more substantial evidence as to the meaning of each of the symbols. The Colorado Supreme Court, in considering the content, found that the monument does not reproduce exactly the Ten Commandments as accepted by any particular sect. *Colorado v. Freedom From Religion Foundation,* 898 P.2d 1013, 1023 (Colo. 1995). The Ruegemer affidavit confirms the FOE's intent to be nonsectarian. In addition, the monument contains various religious symbols that express a desire to include something for everyone, although as is frequently the case, it is possible that they have managed to offend everyone in the process. It includes an "all-seeing eye" inside of a pyramid, which has both a religious meaning based on the religions of ancient Egypt, and a nonsecular meaning as one of the symbols used on the one-dollar bill. *Id.* It includes two Jewish symbols, the stars of David, and a symbol used in the early Catholic Church. Besides these religious symbols, it contains an eagle and a flag, both generally accepted as patriotic symbols. Experts who testified at the Colorado trial agreed that the Commandments were

expressions of universal moral standards common to all western societies and have played a large role in the development of the common law and formed a part of the moral background for the adoption of the national constitution. *Id.* Finally, the monument contains an inscription at the bottom stating that is was donated by the Fraternal Order of the Eagles.

Although the text of the Ten Commandments dominates the monument, it cannot be said that the message of the monument is exclusively religious. A neutral observer looking at the monument, presumed to have an awareness of its history, would know that the Ten Commandments has both religious and historical significance in this nation. The observer should be able to tell by looking at the monument that it attempts to acknowledge equally the significance of the major religions represented in this country at the time of its donation to the City. In addition, the observer would know that the City has included the monument as part of its overall collection of displays of historical and cultural significance. The lawn in front of the Municipal Building is small, and the City could not be expected to put all of its displays in one place. Local municipalities should be granted some latitude by the federal courts in how they arrange artistic displays in the space they have available.

The question of the monuments location near the seat of government is a more difficult one. If the City had a large park nearby where it could place the monument with others, the case would be more clear cut as it would more nearly resemble the contexts in which other courts have found identical monuments to be constitutional. *See Colorado*, 898 P.2d 1013, and *Anderson v. Salt Lake City*, 475 F.2d 29 (10th Cir. 1973). However, the City has pointed to other monuments at least an equal distance from the courthouse door, with additional displays inside. The monument is not as obtrusive as the religious message "The World Needs God" directly over the courthouse door that was at issue in *Doe v. Montgomery*, which the court on remand found to be an unconstitutional endorsement of religion. *Doe v. County Montgomery, Ill.*, 41 F.3d 1156 (1994), *on remand*, 915 F. Supp. 32 (C.D. Ill. 1996). This Court holds that it is not an unconstitutional endorsement of religion for the City of Elkhart to acknowledge the importance of the Ten Commandments

in the legal and moral development of this nation by displaying this monument in its present location on the lawn of the Municipal Building.

D. The Coercion Test

County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989), was a fractured opinion concerning the constitutionality of two separate Christmas displays, a creche in the county courthouse, and a menorah and a Christmas tree placed just outside the City-County Building. Three justices found that both displays violated the Constitution, four justice found that both were constitutional, and two justices agreed that the creche in the courthouse gave the appearance that the county endorsed Christianity, while the context of the outside display neutralized any message of endorsement. *Id.* Justice Kennedy, writing for himself, Chief Justice Rehnquist and Justices Scalia and White, expressed concern that language from the Supreme Court's Establishment Clause jurisprudence, "taken to its logical extreme, would require a relentless extirpation of all contact between government and religion." *Allegheny*, 492 U.S. at 656. This, he says, is not the purpose of the Establishment Clause, and its history indicates that government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage. *Id.* "Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society." *Id.* (citing *Lynch*, 465 U.S. at 678, and *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 669, 25 L. Ed. 2d 697, 90 S. Ct. 1409 (1970). He noted the concern of Chief Justice Burger, the author of the *Lemon* test, that a strict application of the words and phrases of *Lemon* could "undermine the ultimate constitutional objective as illuminated by history."

Justice Kennedy went on to say,

> Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment

> of the religious. A categorical approach would install federal courts as jealous guardians of an absolute "wall of separation," sending a clear message of disapproval. In this century, as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality. *Id.*

Looking at previous Establishment Clause decisions, Justice Kennedy observed that there were two limiting principles that facilitated the "diligent observance of the border between accommodation and establishment." 492 U.S. at 659. The first is that government may not coerce anyone to support or participate in any religion or its exercise. *Id.* The second is that government may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so." *Id.* (citing *Lynch,* 465 U.S. at 678. Justice Kennedy then concludes that these two principles, while distinct, are not unrelated, "for it would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing." Justice Kennedy observed that the Court had without exception invalidated actions that further the interests of religion through the coercive power of government. 492 U.S. at 660.

For symbolic recognition or accommodation to violate the Establishment Clause, according to Justice Kennedy, would require an extreme case, like the display of a large Latin cross on the roof of city hall, which would have the effect of placing the government's weight behind an obvious effort to proselytize on behalf of a particular religion. *Id.* at 661. "Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal. Our cases reflect this reality by requiring a showing that the symbolic recognition or accommodation advances religion to such a degree that it actually "establishes a religion or faith, or tends to do so." *Id.*

at 662 (quoting *Lynch*, 465 U.S. at 678). Therefore, Justice Kennedy concludes, "Noncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage." 492 U.S. at 662-63.

In 1992, Justice Kennedy applied his coercion test in *Lee v. Weisman*, a case involving a challenge to the inclusion of school sponsored invocations and benedictions in graduation ceremonies at public schools. 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992). Once again the court splintered, with two concurring opinions and a four justice dissent written by Justice Scalia. Justice Kennedy writing for the majority found that because the only alternative available to students was to miss graduation ceremonies, the practice exerted psychological coercion on the students which compelled them to participate in religious exercises, something which the government cannot do. *Id. at 599.*

Judge Easterbrook has written dissenting opinions more than once in Seventh Circuit cases to express his conclusion, similar to that of Justice Kennedy, that while the Establishment Clause of the First Amendment forbids taxation and coercion in support of religion, it does not forbid the display of religious symbols. *Harris v. City of Zion, Lake County, Illinois*, 927 F.2d 1401, 1422 (1991) (Easterbrook, J. dissenting, citing *Allegheny*, 492 U.S. at 655-79 (Kennedy, J. dissenting), and citing his previous dissent in *American Jewish Congress v. Chicago*, 827 F.2d 120, 128-40 (7th Cir. 1987).

Judge Easterbrook observed in his dissent in *American Jewish Congress*, when dealing with religious symbology, "[people may venerate, disdain, or curse the icons as they please, without reward for the first or reprisal for the last. To hold that Chicago may not use a symbol showing the religious origin and significance of a national holiday is to extend Jefferson's 'wall of separation' metaphor beyond its proper scope." *Id.* at 129. Concerning religious speech, Judge Easterbrook observed that speech is not coercive; the listener may do as he likes. *Id.* at 132. "When the government expresses views in public debates, all are as free as they were before;

that these views may offend some and persuade others is a political rather than a constitutional problem." *Id.* He pointed out that the government has engaged in religious speech since the founding of the Republic, and that those practices, from "In God we Trust" on the nation's money, to the Pledge of Allegiance to the declaration of national days of prayer and thanksgiving all share the common thread that no one is coerced to participate. *Id.* "The holder of a nickel need not Trust in God, no matter what the coin says, and need not contribute the nickel (or even three pence) to a church. He may labor on Christmas if he likes . . ., may 'affirm' rather than 'swear' when giving testimony and be silent while others say the Pledge of Allegiance." *Id.* (citations omitted). In sum, Judge Easterbrook stated that the government may encourage what it may not compel. *Id.; see also Rust v. Sullivan*, 500 U.S. 173, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991) (holding that when the government is using its spending power, it does not violate the Constitution when it chooses to fund some viewpoints and not others; specifically, when it forbids employees to use federally provided funds in a program in which abortion is advised as a method of family planning). These are very wise words, even if in dissent.

Applying Justice Kennedy's coercion test to the Ten Commandments monument in Elkhart, the City's display of the monument passes constitutional muster. The monument was a gift from the FOE, and Plaintiffs have not alleged that the City expends taxpayers' money in maintaining it. Any money spent on landscaping and maintenance would probably be spent whether the monument was there or not. Nor do they allege that anyone is forced to stand in front of the monument and read its religious message. In other words, the presence of the statute completely lacks the necessary element of coercion. If one accepts the view that the First Amendment's purpose was to prevent people from being coerced into contributing to religions with which they disagree, or to participate in unwelcome religious exercises, then the passive acceptance and continued display of a monument containing the Ten Commandments does not violate the Establishment Clause.

E. The Test for Religious Speech in a Public Forum

At first glance, this test would seem not to apply to the monument in question because it was donated to the City of Elkhart and can no longer be considered the speech of private actors. However, the parties have raised the issue in their briefs, so the Court will briefly address it. *Pls' Mem. in Sup. at 23 and Pls' Reply Mem. Addressed to Def.'s New Argument Concerning Forum; and Def.'s Ans. Brief at 14.* The City contends that the current ownership of the monument should be disregarded because it was originally a gift from the FOE, and a designation on the monument clearly states this fact. Under this analysis, the Court would have to determine if the City has created a public forum, and if requiring removal of the monument based on its religious content would be an unconstitutional discrimination based on viewpoint. The Plaintiffs contend that the public forum analysis is irrelevant because it is the City displaying the monument, not the FOE. The line is a difficult one to draw since the circumstances surrounding the presence of the monument on city property are not unlike those in *Capital Square Review and Advisory Board v. Pinette,* 515 U.S. 753, 132 L. Ed. 2d 650, 115 S. Ct. 2440 (1995), and in *Grossbaum v. Indianapolis-Marion County Building Authority,* 63 F.3d 581 (7th Cir. 1995), except that they took place at an earlier time. In *Capitol Square*, a private organization sued the Advisory Board for refusing to issue a permit allowing them to erect a large Latin cross in the plaza next to the state capitol building. *Capitol Square,* 515 U.S. 753, 132 L. Ed. 2d 650, 115 S. Ct. 2440. First, the Supreme Court upheld the determination of both lower courts that Capital Square was a traditional public forum. *Id.* at 761. They concluded that a line of cases involving private religious speech applied, and held that the defendant's legitimate interest in avoiding official endorsement of religion did not justify content-based regulations in a public forum. *Id.* (citing *Lamb's Chapel v. Center Moriches Union Free School Dist., 508* U.S. 384, 396-5, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993), and *Widmar v. Vincent,* 454 U.S. 263, 271, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981)).

In 1997, the Tenth Circuit Court of Appeals heard a case that presents an interesting twist on the controversy before this Court. In *Summum v. Callaghan,* 130 F.3d 906 (1997), the plaintiffs alleged that their constitutional rights were

violated when the County denied them the right to put a monument on the courthouse lawn displaying the tenets of their religious faith. *Id.* at 911. They argued that the County had created a public forum based on nothing more than the fact that the Ten Commandments monument[23] had stood on property owned by the county since 1971. *Id.* After reviewing recent decisions concerning public forums, including *Grossbaum* from the Seventh Circuit, the Court held that the installation of the monument by the FOE was sufficient to transform the lawn of the county courthouse into a "limited public forum as it has more recently been defined by the Supreme Court." *Id.* at 919. The Court did not seem to find the fact that the monument had been donated to the County dispositive in its forum analysis.

In *Grossbaum*, the plaintiff brought suit after the Building Authority denied him permission to display a menorah in the lobby of the County-City Building. The Seventh Circuit held that, where the City had allowed broad access to a wide variety of public and private speakers, it had created a nonpublic forum. Therefore, the Supreme Court's holdings in *Lamb's Chapel and Rosenberger* applied, and required the Building Authority to have a neutral policy that allowed access to speakers regardless of the religious or non-religious nature of their message. *Grossbaum,* 63 F.3d at 595-6.

Grossbaum does not address the question of religious gifts, which is the problem faced by the City of Elkhart, but it does not seem in this case that the City's acceptance of the monument in 1956, at a time when the Supreme Court had just declared that we are a religious people whose institutions presuppose a Supreme Being, should turn a constitutionally permissible display of private religious speech into an unconstitutional expression of religious sentiments by the government. The City of Elkhart has chosen to keep the Ten Commandments monument as part of its general policy to display objects of cultural and historical significance on public property. Nothing in the record indicates that the City has ever refused to accept and display an object on its property for a content-based or

and the period of prayer.

36 U.S.C. § 116 (1988).

discriminatory reason. Therefore, the City has met the requirement of strict neutrality for displays of private speech on public property.

VIII. CONCLUSION

There have been times in our society when a voice from the back of the bus has raised profound questions as to where we were heading as a society. This may be a voice from the back of the judicial bus attempting to raise questions about where we are headed under the religion clauses of the First Amendment. Hopefully, this discussion will lead to a careful re-examination of precisely where we are going with our jurisprudence about religious messages and symbols on public property in the United States.

When this labyrinth of decisional law on the Religion Clauses of the First Amendment is examined in its totality, the Plaintiffs fall far short of establishing that they are entitled to an injunction in their favor. This Court is not here compelled to order the City of Elkhart to tear down this monument. It falls equally short of providing a basis for summary judgment in their favor. The Plaintiffs' Motion for Summary Judgment is hereby DENIED. The Defendant's Motion is GRANTED. Each party will bear its own costs.

IT IS SO ORDERED.

DATED: December 22, 1999.

/s/ Allen Sharp
ALLEN SHARP, JUDGE
NORTHERN DISTRICT
OF INDIANA

EPILOGUE

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety

of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For then it respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Justice William O. Douglas, *Zorach v. Clauson,* 343 U.S. 306, 313, 96 L. Ed. 954, 72 S. Ct. 679 (1952).

[22] *See Section II above.*

[23] The constitutionality of the same monument had been upheld in an earlier Tenth Circuit opinion, *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973).

APPENDIX D

***THE ELKHART TRUTH* NEWSPAPER**
MAY 31, 1958

"Ceremonies Pay Tribute
In Memorial Day Rite;
City Given Decalogue"

A Protestant minister, a Catholic priest and a Jewish rabbi agreed Friday that the monolith of the Ten Commandments, presented to the city by the Fraternal Order of Eagles, should serve as a reminder of God's laws to the hearts and minds of all who see it.

Speaking at the presentation ceremonies, the Rev. W. W. Kennell, outgoing president of the Elkhart Ministerial association, said man has followed his own ways instead of those established by God, and today there is a struggle between atomic power and moral power.

Americans have inherited moral power from the founding fathers of our country, he continued, and if they will accept the precepts of the Ten Commandments, it will provide their redemption from today's strife and tears.

Engraved in Hearts

The Rev. William Gleranowski, assistant pastor of St. Vincent's Catholic church, said though God had ordered nature to be under His laws, He had given man a free will.

But, he added, moral law does not change any more than natural law, so the Ten Commandments should not only be engraved in stone, but also in the hearts, minds and conscience of everyone.

"Let us live them," he concluded.

Rabbie M. E. Finkelstein, of Temple Israel, said the dedication of the stone should be an occasion for dedication of everyone to the high ideals inherent in the American way of life.

Look To America

There should be a dedication of individual and collective lives to the principles of the Ten Commandments, he said, so men the world over will never cease to look on

America as the "land of the free and the home of the brave."

As the stone was unveiled, Mahlon Hull, past president of the Eagles, presented it to Robert Long, city controller, who accepted on behalf of Mayor E. L. Danielson and the city of Elkhart.

The stone, one of a number being presented to cities by Eagles lodges throughout the country, are made by Granite Bronz, Inc. of Cold Spring, Minn., to a standardized design. The stone presented to Elkhart is the larger of two available sizes.

The Municipal band furnished music for the occasion. E. Dale Swihart, Eagle secretary, was master of ceremonies.

Parade on Main Street

The Memorial day parade started north on Main street shortly after 2:00 p.m. It included about a dozen marching units, three bands, several floats, recruiting and military vehicles and a number of other units.

The parade disbanded at Island park, where a Memorial day program was held at 5:00 p.m.

Arthur Fellwock, senior vice commander of the Indiana department, VFW, was the principal speaker. He said the occasion was a tribute to the living veterans as well as the dead.

Memorial day, he continued, is not necessarily a day of sadness, as much as it is a day of reaffirmation of love for those who died and a rededication of the principles for which they died.

Must Remain Vigilant

America must be vigilant to defend itself against the threat of war again, Fellwock said. The spirit of a whole community turning out to hunt for a small child, the spirit of a man jumping into a lake to save a boy, though he couldn't swim, and the spirit of men digging hour after hour to rescue someone buried in a cave-in is the same spirit that prompts men to fight for their country.

And, he concluded, as long as the spirit remains with America, the flag will continue to wave over this country as the land of the free and the home of the brave.

The Elkhart Municipal band played three selections during the program. The Rev. Ivan French, president of the Evangelical Pastors Fellowship, gave the invocation and benediction.

Tribute was paid to the county's oldest war veteran, Albert W. Bell, 90, of Elkhart, now in a nursing home in Bristol. A National Guard unit fired the traditional three volleys of rifle shots.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

WILLIAM A. BOOKS and MICHAEL SUETKAMP, Plaintiffs, vs. CITY OF ELKHART, Defendant.	CASE NO. 3:98CV0230AS

AFFIDAVIT OF E. J. RUEGEMER

E.J. Ruegemer hereby states as follows:

1. I was born July 29, 1902. I currently reside in Alexandria, Minnesota. With respect to the above-captioned matter, because of my age, I do not wish to travel to South Bend, Indiana, or to participate in any formal legal proceedings, other than to prepare this affidavit for possible use in the above-captioned matter.

2. I am retired from the Stearns County Juvenile Court bench, where I served as a judge from 1941 to 1947, and the State of Minnesota District Court bench from 1947 to 1967. In my private life, as one way to participate in civil affairs, I was Chief Justice and Chairman of the Youth Guidance Committee of the Fraternal Order of Eagles.

3. In my work as a juvenile court judge, I came in frequent contact with youngsters who were in trouble with the law. It seemed to me that many of them were without any code of conduct or standards by which to govern their actions. About the year 1943, it occurred to me that they could benefit from exposure to one of mankind's earliest codes of conduct, the Ten Commandments. This was not to be religious instruction of any kind, but to show these youngsters that there were such recognized codes of behavior to guide and help them. I developed the idea of posting a copy of the Ten Commandments in each juvenile courtroom

in the State of Minnesota and later in juvenile courtrooms throughout the country.

4. Such a program would require funding. I presented this idea to the Fraternal Order of Eagles, seeking their support. Initially, the idea was rejected by the Eagles because it was felt this might seem coercive or sectarian. Eventually, however, representatives from the Jewish, Protestant, and Roman Catholic communities joined together and developed a version of the Ten Commandments which was not identified with any one religious group; and on this basis, the Eagles agreed to support such a Youth Guidance program.

5. While this program was being developed, I received a telephone call from motion picture producer Cecil B. DeMille, who was making a film called the "Ten Commandments." He told me that he thought the program was a wonderful idea and suggested that rather than paper copies, the Ten Commandments be put on bronze plaques for distribution throughout the country. I said that since the original Ten Commandments were on granite that this would be an even more suitable material. He agreed, and I worked with two local Minnesota granite companies to produce granite monuments inscribed with the Ten Commandments. Local aeries of Eagles throughout the country paid for monuments which they presented to their communities.

6. Ceremonies were held in connection with the presentation of most of the monuments and some were attended by the film actors who appeared in the Cecil B. DeMille movie; by city, county, and state officials; the Boy Scouts of America; and other civic organizations. Charleton Heston, who played Moses in the film, appeared at one ceremony, and Martha Scott, who played the mother of Moses, appeared at another.

I affirm under the penalties for perjury that the foregoing representations are true.

Dated this 22nd day of September, 1998.

/s/ E. J. Ruegemer

APPENDIX F
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

WILLIAM A. BOOKS and MICHAEL SUETKAMP, Plaintiffs, vs. CITY OF ELKHART, Defendant.	CASE NO. 3:98CV0230AS

AFFIDAVIT OF HAROLD WINEINGER

Harold Wineinger hereby states as follows:

1. I am currently the Indiana State Secretary of the Fraternal Order of Eagles. As such, I am aware of the national and state purpose of the Fraternal Order of Eagles, which includes the Elkhart branch of the Fraternal Order of Eagles, Elkhart Aerie No. 395.

2. The Fraternal Order of Eagles is not a religious organization. It's main mottos are "The Fraternity for the Common Man" and "People Helping People." Since it's establishment in 1898, the Fraternal Order of Eagles has sponsored the first workmen's compensation law, mother's pension law, old age pension law, and the enactment of the social security law. The Fraternal Order of Eagles has also established the Jimmy Durante Eagle House and other programs that are described on the attached list, with corresponding dates.

3. The four corner stones of the Fraternal Order of Eagles are "Liberty, Truth, Justice and Equality."

4. The Ten Commandments Monument dedication, by Elkhart Aerie No. 395 to the City of Elkhart, and many similar donations across the country, were made pursuant to the foregoing purposes of the Fraternal Order of Eagles.

I affirm under the penalties for perjury that the foregoing representations are true.

Dated this 3rd day of December, 1998.

/s/ Harold Wineinger

Fraternal Order of Eagles Milestone of Eagle Progress

1898 -- Order was founded on Feb. 6 in Seattle
1900 -- Sponsored America's first Workmen's Compensation Law
1910 -- Sponsored America's first Mother's Pension Law
1923 -- Sponsored America's first Old Age Pension Law
1935 -- Supported enactment of Social Security Law
1942 -- Build Eagle Dormitory at Boy's Town in Nebraska
1944 -- Established the Eagles Memorial Foundation
1950 -- Completed the Chapel of the Four Chaplains
1953 -- Founded the Eagle House in Free Berlin, Germany
1957 -- Inaugurated natiowide "Jobs After Forty" program
1958 -- Established the Eagle House Trade School in Naples, Italy
1959 -- Built "Eagle Hall" at Home on the Range, Sentinel-Butte, North Dakota
1960 -- Established "Eagles Max Baer Heart Fund" for coronary research
1961 -- Dedication of Eagle Village, Bradenton, Florida, low rental housing project
1962 -- Establishment of Eagle House at Abadan, Iran
1963 -- Establishment of Eagle House at Nuevo Lardeo, Mexico
1965 -- Establishment of Eagle House at Tunis, Tunisania
1966 -- Establishment of Ralph Bird Memorial Library at Eagle Village
1967 -- Establishment of Eagles Jimmy Durante Children's Fund
1968 -- U.S. Congress passes the Eagles' Jobs After Forty legislation
1968 -- Establishment of Eagle House at Colombia, South America
1969 -- Establishment of Eagle House i the Philippe Islands
1970 -- Establishment of Eagle Ridge Village, Topeka, Kansas
1971 -- Establishment of Max Schroeder Eagle House in South Korea
1972 -- Established Golden Eagle Fund
1973 -- Order celebrates 75th anniversary
1974 -- Established Jimmy Durante Eagle House at Managua, Nicaragua
1975 -- Initiated "Blow the Whistle on Crime" program
1976 -- Instituted First European Aerie
1977 -- Established Eagle care Virginia Turner Memorial Center in Guatemala
1978 -- Established Hubert H. Humphry Eagle's CARE School in Honduras
1979 -- First telethon for Hughen School for Children, Port Arthur, Texas
1980 -- Eagles' Bob Hope High School dedicated at Hughen School, Port Arthur, Texas
1981 -- Terry Fitzpatrick Firehouse at Alliance, Nebraska
1982 -- Frank Goffio CARE Center, Chile
1983 -- Eagles to the Rescue in Poland
1984 -- Feed the Hungry in Africa
1985 -- Eagle's Anti-Child Abuse Program
1986 -- Alzheimer's Disease and illicit drugs

APPENDIX G

RESOLUTION

WHEREAS, the issue of the Ten Commandments Monument outside Elkhart City Hall has been raised by a person who is represented by the Indiana Civil Liberties Union. The Indiana Civil Liberties Union has contacted the Mayor of the City of Elkhart and has stated that a lawsuit will be filed if the Ten Commandment Monument is not removed.

WHEREAS, in recognition of the historical significance of the Ten Commandments, the Fraternal Order of Eagles presented the Ten Commandment monument to the City of Elkhart in May, 1958. In addition to the Ten Commandments, the Monument contains symbols that reflect the cross cultural and historical significance of the Ten Commandments.

WHEREAS, the Ten Commandments Monument has stood outside in an unobtrusive location to the north of the entrance of City Hall since 1958. There are numerous other historical and cultural plaques, memorials, and monuments located south of the entrance of city hall, in the foyer just inside the city hall entrance, at the first floor open area of city hall, and at the second and third floor open areas of city hall; and

WHEREAS, the Ten Commandments have had a significant impact on the development of the fundamental legal principles of Western Civilization.

NOW, THEREFORE, BE IT RESOLVED BY THE COMMON COUNCIL OF THE CITY OF ELKHART, INDIANA, THAT:

The Ten Commandments Monument is a historical and cultural monument that reflects one of the earliest codes of human conduct. It is proper for the Ten Commandments Monument to remain and the defense of this position is strongly endorsed.